

## TABLE OF CONTENTS.

	PAGE
STATEMENT OF CASE .....	2
THE DECREE APPEALED FROM .....	2
THE ORDER OF OCTOBER 29, 1912 .....	2 3
The Attempts of the Belt Line Railway Corporation and the New York Railways Company to be relieved of the order of October 29th, 1912..	6
The commencement of this suit and the injunction <i>pendente lite</i> .....	9
The Trial .....	9
The Proceedings before the Master .....	9
The Report of the Special Master .....	10
The Decision and Opinion of the District Court..	10
THE FACTS .....	11
The franchise and incorporation of Belt Line Railway Corporation .....	12
Valuation of property of Belt Line Company .....	13
The Public Service Commission recognized that conditions had so changed as to make the five cent joint rate established by the Order of October 29th, 1912 confiscatory .....	17
The proof showing that the five cent joint rate fixed by the Order of October 29th, 1912 was confiscatory .....	19
Comparison of number of passengers carried before and after the cutting off of the joint rate by interlocutory injunction .....	24
The elimination of joint rate passengers, from each of whom the Belt Line Company would have received only two cents, saved the Belt Line Company from the operation of additional car mileage .....	26

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	PAGE
<b>BRIEF OF THE ARGUMENT .....</b>	35
✓ <b>POINT I.—The Belt Line Company properly invoked the jurisdiction of the District Court .....</b>	35
✓ <b>POINT II.—The Order of October 29th, 1912 was not a service order or requirement .....</b>	48
<b>POINT III.—The Joint Rate Order of October 29th, 1912 is confiscatory .....</b>	51
✓ <b>POINT IV.—The Belt Line Company is entitled to complain of the joint rate order of October 29th, 1912 as an infringement of its constitutional right ..</b>	65
<b>POINT V.—There has been no action or conduct on the part of the Belt Line Company which gives any foundation whatever for the Appellants' claim that it is not entitled to equitable relief .....</b>	72
<b>POINT VI.—The District Court did not find, as claimed by Appellant Banton in his brief, that there was only a loss of \$4,000 per annum on the joint rate traffic cut off by the injunction herein .....</b>	75
<b>POINT VII.—The Appellant Banton's argument in his Point II that the Belt Line Company would, if it resumed the joint rate traffic, earn a fair return on the property is contrary to the evidence herein .....</b>	78
<b>POINT VIII.—The valuation of the Belt Line Company's property found by the Master and approved by the District Court was justified by the evidence .....</b>	81
<b>CONCLUSION—The Decree appealed from should be affirmed .....</b>	88
<b>APPENDIX "A"—Section 9 of Stock Corporation Law..</b>	91
<b>APPENDIX "B"—Section 29 of Public Service Commissions Law .....</b>	93

## INDEX OF AUTHORITIES.

iii

	PAGE
Bluefield W. W. and I. Co. <i>v.</i> Public Service Commission, 262 U. S. 679 .....	86
Chesapeake & Ohio Railway <i>v.</i> Public Service Commission, 242 U. S. 603 .....	49
Georgia Railway Co. <i>v.</i> Decatur, 262 U. S. 432 .....	50
Georgia Railway & Power Co. <i>v.</i> Railroad Commission, 262 U. S. 625 .....	86
Interstate Railway Co. <i>v.</i> Massachusetts, 207 U. S. 79 .....	65
Minor <i>v.</i> Erie Railroad Co., 171 N. Y. 566 .....	69, 70
Missouri <i>ex rel.</i> Southwestern Bell Telephone Company <i>v.</i> Public Service Commission, 262 U. S. 276 .....	85, 86
New York Terminal Co. <i>v.</i> Gaus, 139 App. Div. 347 .....	68
Northern Pacific Railway Co. <i>v.</i> North Dakota, 236 U. S. 585 .....	42, 54, 60, 87
People <i>v.</i> O'Brien, 111 N. Y. 1 .....	67
People <i>ex rel.</i> Westchester Street R. R. Co. <i>v.</i> Public Service Commission, 158 App. Div. 251 .....	67
People <i>ex rel.</i> Third Avenue Railway Co. <i>v.</i> Public Service Commission, 203 N. Y. 299 .....	68
Prendergast <i>v.</i> New York Telephone Co., 262 U. S. 43 .....	36, 38
Railroad Commission <i>v.</i> Eastern Texas R. Co., 263 U. S. 79 .....	50
Trojan Ry. Co. <i>v.</i> City of Troy, 125 App. Div. 362 .....	68
United States <i>v.</i> Abilene & So. Ry. Co., 265 U. S. 274 .....	37, 46
Village of Phoenix <i>v.</i> Gannon, 195 N. Y. 471 .....	68

## STATUTES.

Chapter 511, Laws of 1860 .....	12, 67
§9, Stock Corporation Law .....	13, 66
§22, Public Service Commissions Law .....	37
§29, Public Service Commissions Law .....	47
Subdiv. 3, §49, Public Service Commissions Law .....	4, 43, 45
§§53, 54, 55, Public Service Commissions Law .....	68



# Supreme Court of the United States

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OCTOBER TERM, 1924.

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No. 465.

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JOAB H. BANTON, as District Attorney of the County of  
New York, State of New York, and TRANSIT COMMISSION,  
State of New York,

*Appellants,*

*v.*

BELT LINE RAILWAY CORPORATION,

*Appellee.*

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## **BRIEF FOR APPELLEE, BELT LINE RAILWAY CORPORATION.**

Neither of the opinions below—Judge Hough (R. p. 75) in denying the Transit Commission's motion to dismiss, and Judge Knox (R. p. 118) in granting the final decree—is reported.

The Belt Line Railway Corporation, appellee here, plaintiff below, is hereinafter referred to as the "Belt Line Company," and its predecessor, Central Park, North & East River Railroad Company, is hereinafter referred to as the "Central Park Company."

**STATEMENT OF THE CASE.****The Appeal.**

The decree appealed from (R. p. 120):

I. Confirms the finding and conclusion of the Master herein that so much of the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912 (hereinafter referred to as the "order of October 29th, 1912") as required the Belt Line Company to exchange transfers for a single five-cent fare with the lines of the Second Avenue Railroad Company and the New York Railways Company at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and Seventh Avenue is confiscatory:

II. Adjudges that the order of October 29th, 1912 is confiscatory and deprives the Belt Line Company of its property without due process of law, and is contrary to the Fourteenth Amendment to the Constitution of the United States in so far as it fixes at five cents the maximum joint rate, fare or charge to be exacted for through transportation over the lines of the Belt Line Company and the lines operated by all other street railway corporations mentioned in said order of October 29th, 1912, excepting the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, and in so far as it requires the Belt Line Company to maintain such through routes at such five-cent joint rate, and in so far as it requires Belt Line Company to deliver and receive transfers for the carrying out of said joint rate;

III. Adjudges the Belt Line Company has no remedy at law for the injury which will result from the enforcement of the order of October 29th, 1912;

IV. Enjoins the defendants from enforcing or attempting to enforce the provisions of the order of October 29th, 1912, excepting in so far as such order provides for joint rates, fares and charges between the lines of the Belt Line Company and the lines of the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company.

The order of October 29th, 1912 (R. p. 14), establishes through routes and joint rates, fares and charges between the 59th Street Crosstown Line of the plaintiff's predecessor, Central Park Company, operating in an east and west direction on 59th Street, and the intersecting lines of the New York Railways Company, the Second Avenue Railroad Company in the City of New York, the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, all operating in a north and south direction, and fixes the maximum joint rate, fare and charge for such through transportation at five cents, and requires such Railway Companies to make, within thirty days from and after December 1st, 1912, an agreement as to the proportion of each such five-cent joint rate to which each of them should be entitled.

The through routes so established by the Commission were not physically continuous through routes, but through routes which enabled a passenger by making a physical change from the car of one street railway company to the car of another independent street railway company, to ride on the lines of both such street railway companies for a single five-cent fare.

The statutory authority for the order of October 29th, 1912 and the authority upon which the Public Service

Commission relied in making that order (fol. 594, R. p. 378) was Subdivision 3 of §49 of Chapter 480 of the Laws of the State of New York of 1910, being the Public Service Commissions Law and constituting Chapter 48 of the Consolidated Laws, which reads as follows:

"3. The commission shall have power by order to require any two or more common carriers, railroad corporations or street railroad corporations, whose lines, owned, operated, controlled or leased, form a continuous or connecting line of transportation or could be made to do so by the construction and maintenance of switch connection or interchange track at connecting points, or by transfer of property or passengers at connecting points, to establish through routes and joint rates, fares and charges for the transportation of passengers and property within the state as the commission may, by its order, designate; and in case such through routes and joint rates be not established by the common carriers, railroad corporations and street railroad corporations named in any such order within the time therein specified, the commission shall establish just and reasonable rates, fares and charges to be charged for such through transportation, and declare the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured; and the commission shall also have power in the same proceeding, or in a separate proceeding involving any rates, fares or charges, to prescribe joint rates and fares and charges as the maximum to be exacted

for the transportation by them of passengers and property within the state, and to require such common carriers, railroad corporations and street railroad corporations affected thereby to make within a specified time an agreement between them as to the portion of such joint rates, fares or charges to which each of them shall be entitled; and in case such agreement be not so made within the time so specified the Commission may declare by supplemental order the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured; such supplemental order shall take effect as part of the original order from the time such supplemental order shall become effective."

In October, 1919 and February, 1920, the Railroad Companies owning and operating the street railway lines on Madison Avenue, Eighth Avenue and Ninth Avenue, having taken over the operation of such lines on the surrender of the leases by the Receiver of the New York Railways Company, the through routes and joint rates between such lines and the lines of the Belt Line Company were discontinued and the Commission permitted the Belt Line Company to change its tariff schedules in conformity thereto (Exhibits K and L, R. pp. 302, 394, 395).

The following diagrams show the street railway lines over and between which joint rates and through routes were effective under the order of October 29th, 1912, (1) before the commencement of this action and (2) after

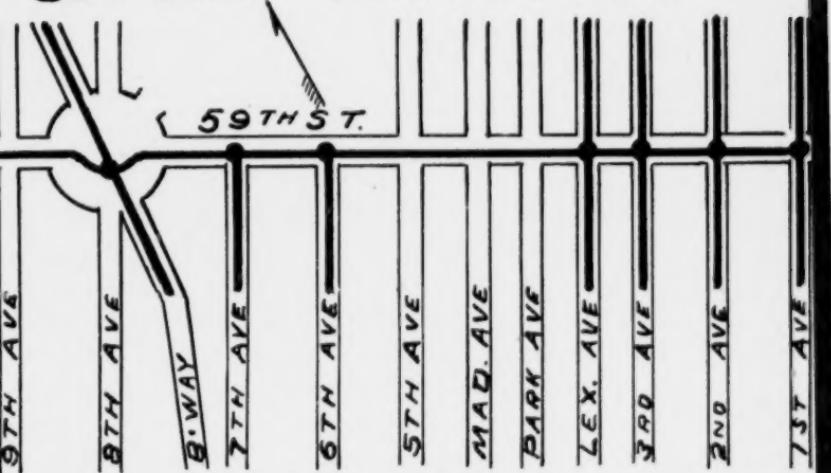
the preliminary injunction was granted herein on January 25th, 1921 (R. p. 70)—the injunction—in the final decree is to the same effect—thus showing the result of the decree now appealed from:

*See Diagram opposite  
The Attempts by the Belt Line Company and the  
New York Railways Company to be Relieved  
from the Order of October 29th, 1912.*

The Receiver of the New York Railways Company applied, by petition dated May 11th, 1920, to the Public Service Commission to be relieved from the requirements of the order of October 29th, 1912 (Exhibit CH, R. pp. 393-399). The Belt Line Company, by petition to the Public Service Commission, verified May 18th, 1920, joined in the application of the Receiver of the New York Railways Company and prayed for a modification of the order of October 29th, 1912, so that the joint rate between the lines operated by the Belt Line Company and the lines operated by all the other street railway corporations named in the order of October 29th, 1912, excepting the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, should be discontinued (Exhibit BM, R. pp. 348, 351).

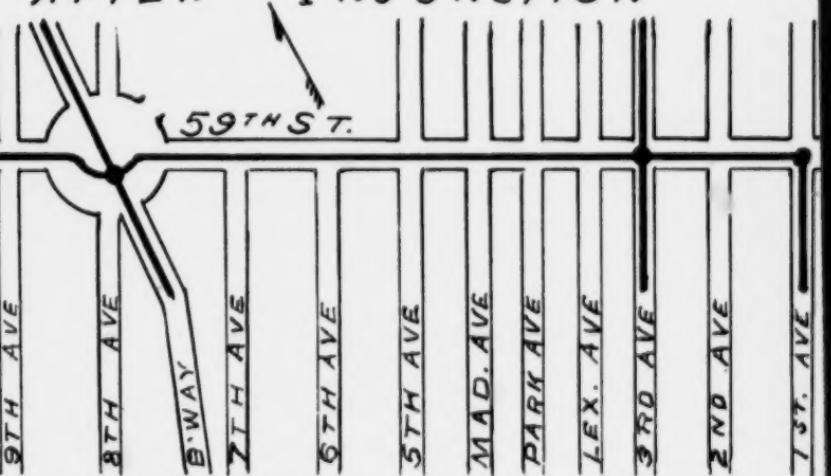
On May 22nd, 1920, the Belt Line Company filed with the Public Service Commission a revised tariff, eliminating the joint rates between its 59th Street line and the other lines named in the order of October 29th, 1912, excepting the lines of the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company. These revised tariffs by their terms were to become effective on June 22nd, 1920 (Exhibit BL, R. pp. 335-347).

BEFORE INJUNCTION



INDICATES POINTS OF PHYSICAL TRANSFER  
INDICATES STREET RAILWAY LINES

AFTER INJUNCTION



INDICATES POINTS OF PHYSICAL TRANSFER  
INDICATES STREET RAILWAY LINES



On June 18th, 1920, the Public Service Commission, by its order dated June 18th, 1920, suspended the revised tariff schedules of the Belt Line Company and deferred the operation of such revised tariff schedules until July 22nd, 1920 (Exhibit Q, R. p. 304).

Thereafter hearings were held on the applications of the Receiver of the New York Railways Company and Belt Line Company to be relieved from the requirements of the order of October 29th, 1912 (R. p. 401), and on July 9th, 1920, *the Public Service Commission made an order as a result of said applications and hearings in which it held that:*

**"the maximum joint rate of five cents fixed in the said order of October 29th, 1912, is, by reason of the changed conditions under which the said railroad companies are operating, unjust, unreasonable and insufficient to render a fair and reasonable return for the service furnished,**

*and in which order it fixed a joint rate of seven cents instead of five cents, said change to become effective September 13th, 1920, and also annulled the revised tariffs of the Belt Line Company hereinbefore referred to (Exhibit R, same as Exhibit K, annexed to Bill of Complaint, R. pp. 48-49).*

On July 23rd, 1920, the Belt Line Company applied for a re-hearing in the matter by an application (R. p. 402) in which it set forth that a joint rate of seven cents was confiscatory and that the evidence thus far submitted had no reference to a joint or through rate of seven cents.

The Public Service Commission never passed on the

application of the Belt Line Company for such re-hearing until November 4th, 1920 (three and one-half months after the application), on which date it made an order to which reference will presently be made.

On August 28th, 1920, the Receiver of the New York Railways Company also filed an application for a re-hearing (R. p. 403). On August 31st, 1920, the Public Service Commission granted the application of the Receiver of the New York Railways Company for a re-hearing and fixed the time for such re-hearing for November 5th, 1920 (Exhibit CM, R. p. 405). *This order of the Public Service Commission postponed indefinitely (or as the order itself states: "until such date or dates as shall or may be fixed by the Commission at or after the determination of such re-hearing") the time for the taking effect of the seven-cent joint rate and all other dates specified in its order of July 9th, 1920.*

The order of the Commission made November 4th, 1920, granting the application of the Belt Line Company for a re-hearing also *postponed indefinitely the time for the taking effect of the seven-cent joint rate and all other dates specified in its order of July 9th, 1920.*

Hearings were held on the re-hearing on November 5th and 10th, 1920, on which last mentioned date the matter was finally submitted to the Public Service Commission and the case was closed (Bill of Complaint, R. p. 10, Answer of Public Service Commission, R. p. 51, Answer of District Attorney, R. pp. 53-54).

Neither the Public Service Commission nor its successor, the Transit Commission, has ever made a determination upon such re-hearing. Thus the seven-cent joint rate mentioned in the order of July 9th, 1920 never became effective.

### **The Commencement of this Suit and the Injunction Pendente Lite.**

This suit was commenced December 16th, 1920, and such proceedings were had that the Statutory Court, constituted as provided in §266 of the Judicial Code, and composed of Hon. Charles M. Hough, Circuit Judge, and Hons. Learned Hand and Julius M. Mayer, District Judges, on January 25th, 1921 granted the motion for an injunction *pendente lite* (R. p. 70) after rendering an opinion (R. p. 67) which is reported in 273 Fed. 272. In that opinion the Court made nineteen Findings of Fact and legal Conclusions therefrom. X

### **The Trial.**

The Transit Commission was substituted for the defendant, Public Service Commission, and on consent amended its Answer by alleging that the Belt Line Company is not entitled to complain of the order of October 29th, 1912 because it was incorporated subsequent and subject thereto, and then moved to dismiss the Bill of Complaint on the pleadings as amended, which motion was denied by Circuit Judge Hough (Opinion, R. p. 75), who referred the matter to the late Hon. E. Henry Lacombe, as Master, "to hear the allegations and proofs of the parties and report to this Court with all convenient speed the evidence taken by him together with his findings and conclusions thereon" (R. p. 78). These proceedings appear in the Record at pages 71-78.

### **The Proceedings Before the Master.**

Hearings were held before the Master between October 17th, 1922 and February 14th, 1923, and the testimony taken at such hearings comprised 540 pages and 170 ex-

hibits, consisting of official records, statistical records and financial statements which were received in evidence.

#### **The Report of the Special Master.**

The Master made and filed his report dated May 25th, 1923 (R. pp. 78-100), in which he found (R. p. 109) :

"So much of the order of the Commission of October 29th, 1912, as requires complainant to exchange transfers, for a single 5-cent fare with the lines of the Second Avenue R. R. Co., and the New York Railways Co. at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and Seventh Avenue is confiscatory."

#### **The Decision and Opinion of the District Court.**

The District Judge, in confirming the Master's conclusion that the joint rate, if enforced, would continue to be confiscatory, bases his conclusion (R. p. 118) upon both the "out-of-pocket cost" theory which the appellants erroneously, as we believe, contend is the only basis upon which this case is to be considered, and also upon the ground that the cost to the Belt Line Company of carrying each passenger far exceeded the two cents which was the limit which the Belt Line Company received for carrying the joint rate passengers under the order of October 29th, 1912. In other words, there can be no difference between the service afforded a joint rate passenger and the service afforded to other passengers, and that therefore, since the proof conclusively showed that the cost of carrying each passenger far exceeded the two cents, which was the limit which the Belt Line Company received for carrying the joint rate passengers, the order of October 29th, 1912, is confiscatory.

The District Judge also approved the Master's finding of the valuation of \$2,600,000 to be accorded to Belt Line Company's property for the purpose of calculating a reasonable return, and in concluding his opinion, gave the following additional significant reason for finding that the order of October 29th, 1912 is confiscatory (R. p. 120):

"But aside from the particular theory to be employed in determining whether the Public Service Commission order of October 29, 1912 is confiscatory, the case presents the unusual and most persuasive circumstance that the Commission itself upon June 9, 1920 entered its order to the effect that the joint rate of five cents fixed by the order of October 29, 1912, had through changed conditions, become 'unjust, unreasonable and insufficient to render a fair and reasonable return for the service furnished \* \* \*.' To my mind, this conclusion, notwithstanding the argument of defendants' counsel to the contrary, is the equivalent of a declaration by the predecessor of one of the defendants that the joint rate of five cents was confiscatory. The evidence satisfies me that the joint rate, if enforced, would continue to be confiscatory. The Master's conclusion to the same effect will be confirmed."

#### **THE FACTS.**

The appellant, Transit Commission, makes the following statement in its brief (p. 3):

"There is little or no conflict of testimony in this case. The controversy upon the facts arises from the different inferences and conclusions to be

drawn from testimony and statistics which are substantially undisputed. \* \* \*

#### **The Franchise and Incorporation of Belt Line Company.**

The franchise of the Belt Line Company was granted directly to certain individuals by the Legislature of the State of New York by Chapter 511 of the Laws of 1860. This statutory franchise covered 59th Street from First Avenue to Tenth Avenue, also First Avenue and Tenth Avenue south of 59th Street, and other streets therein named, and contained the following provision:

After the passage of the above Act (June 5th, 1860) the individuals named in the above mentioned statute incorporated the Central Park, North & East River Railroad Company (hereinafter referred to as the Central Park Company) for the purpose of constructing the street railroad referred to in that Act (C. 511, L. 1860) (Exhibit G, R. pp. 289-291). Thereafter, on December 28th, 1861, the municipal authorities of the City of New York granted to the Central Park Company permission for the construction and operation of the street railroad referred to in the aforesaid Act (Exhibit E, R. pp. 283-285).

When the order of October 29th, 1912 was made, the Central Park Company was operating the street surface railroad on 59th Street and on the other streets named in the statutory franchise above mentioned.

In the years 1911 and 1912, the Central Park Company was reorganized by a sale of its corporate property and franchises under a decree of foreclosure and sale made by the United States Circuit Court for the Southern District of New York, upon which sale the property and franchises of the Central Park Company were sold to Edward Cornell for \$1,673,000 (Exhibit B, R. pp. 264-

269) who, as such purchaser, immediately (December 21st, 1912) under and pursuant to then §9 of the Stock Corporation Law of New York, entitled "§9. Re-organization upon Sale of Corporate Property and Franchises" (a copy of which is hereto annexed and marked "Appendix A"), made and filed the Certificate which reorganized the Central Park Company into the Belt Line Company (Exhibit F, R. pp. 286, 288).

For further emphasis, however, we quote here the following from such statute:

"Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its Receiver and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation."

The property was vested in the Belt Line Railway Corporation by a deed from Edward Cornell dated January 21, 1913 (Exhibit D, R. pp. 279, 282).

#### **Valuation of Property of Belt Line Company.**

In the proof presented by the Belt Line Company showing that the joint rate order of October 29th, 1912, was confiscatory, the Belt Line Company only deducted interest charged at five per cent. (5%) on the actual amount of its indebtedness, to wit: \$1,823,091.53 (First Mortgage \$1,750,000; Note \$73,091.53). To show justification for this charge of interest at five per cent. (5%) on this amount, the Belt Line Company proved valuation of its property to be far in excess of the amount of its First Mortgage and Note Indebtedness.

Before setting forth the evidence on the question of

valuation, it is important to note that at the time the Belt Line Company was reorganized from the Central Park Company and its bonds and stock were issued, the Public Service Commissions Law was in full force and effect and under that law no bonds or capital stock could be issued nor indebtedness created without the express consent and authorization of the Public Service Commission. The Public Service Commission (the predecessor of the Transit Commission) by four different orders authorized the Belt Line Company to issue and sell its capital stock, mortgage bonds and note, as follows (Exhibits M, N, O and P, R. p. 303, same as Exhibits B, C, D and E annexed to Complaint, R. pp. 26-39):

Capital stock .....	\$ 734,000.00
This Capital Stock was issued pursuant to three orders of the Public Ser- vice Commission, of which the present Transit Commission is the successor:	
Order dated March 19, 1913, Case 1606 (Exhibit M),	
Order dated July 22, 1913, Case 1703 (Exhibit N),	
Order dated November 7, 1913, Case 1723 (Exhibit O),	
First Mortgage Five Per Cent. Bonds ..	1,750,000.00
authorized to be issued by Public Ser- vice Commission by order dated March 19, 1913, Case 1606 (Exhibit M),	
Note .....	73,091.53
authorized by Public Service Commis- sion by order dated October 8, 1915, Case 1778 (Exhibit P).	
<hr/> Total .....	\$2,557,091.53

The stock, bonds and note thus expressly authorized by the Public Service Commission were issued and sold, and the money actually used not only to pay such purchase price but also to pay for additions and improvements to the Belt Line Company (Exhibits CO and CP, R. p. 406).

The Master, as we have stated, found the value of the Belt Line Company's property to be \$2,600,000 and such finding was fully supported by the evidence.

Coming then, to the evidence concerning the valuation of the Belt Line Company's property, there was, in the words of the appellant, Transit Commission, "no conflict of testimony."

There was no conflict of testimony on the question of valuation because no witnesses were called by the appellants to prove valuations and for the additional reason that the witnesses who testified concerning the valuation of the Belt Line Company's property, and whose valuations the Master accepted, were Mr. John H. Madden, who, at the time he testified, was in the employ of the Transit Commission, and at that time and for some time previous thereto, had been charged with the duty of valuing street railway properties in the City of New York, including the property of the Belt Line Company, and also Mr. Irving Ruland, who had been employed by the Transit Commission to value the land of the Belt Line Company. It may be that this is the reason why counsel for the Transit Commission saw fit to delegate to the Corporation Counsel, as his only contribution on this appeal, the task of discussing Mr. Madden's valuation and the returns thereon.

Mr. Madden testified (R. p. 157) that the cost to reproduce plaintiff's property, exclusive of land, as of June

30th, 1921, was \$2,859,754, and that the land was appraised by Mr. Irving Ruland, the appraiser for the Transit Commission, at \$531,000. The Belt Line Company also called Mr. Ruland, who testified that the land of the Belt Line Company was of the value of \$531,000 (R. p. 212).

Mr. Madden later revised his figure of \$2,859,754 by deducting therefrom for change of inventory, the sum of \$77,000, thus making the revised cost to reproduce \$2,778,754.

Mr. Madden then brought his cost to reproduce the property down to the date of the time he was testifying (November, 1922) by stating that such cost would at that time be 10% less than his figure of \$2,778,754, thus making the cost to reproduce the Belt Line Company's property, exclusive of land, at the sum of \$2,504,468.60 (R. pp. 163-164). Mr. Madden has testified that his estimate of depreciation was \$128,246 (R. p. 164).

The above are the only figures which Mr. Madden and Mr. Ruland testified to, and with the exception of figures given by other witnesses called by the Belt Line Company concerning the cost to reproduce certain parts of the Belt Line Company's property, they are the only valuations in the case.

Summarized, these valuations are as follows:

Mr. Madden—cost to reproduce exclusive of land as of the time he testified (November, 1922)	\$2,504,478.60
Mr. Ruland—valuation of land	531,000.
<hr/>	
Total	\$3,035,478.60
Less depreciation	128,246.
<hr/>	
Cost to reproduce new, less depreciation	\$2,907,232.60

The Master found the value of the Belt Line Company's property to be \$2,600,000 and the District Judge states (R. p. 119) :

"This finding, I believe, was justified by the evidence and I shall not disturb it."

As shown by the uncontradicted evidence of Mr. Madden and Mr. Ruland, both of whom were employed by the Transit Commission to value the same properties, the valuation of \$2,600,000 as found by the Master was far below what it should have been.

It is important to note in connection with the above valuation that in the financial statements and exhibits which the Belt Line Company introduced in evidence to show the confiscatory nature of the joint rate order of October 29, 1912, an interest charge of only 5% on \$1,823,091.53 (the amount of the first mortgage—\$1,750,000—plus the amount of the note—\$73,091.53) was deducted; whereas, if instead there had been deducted a return of at least 6% on the valuation of \$2,600,000 the cost of operation and the cost of carrying each passenger would be greater than actually shown on such statements and exhibits, and accordingly the deficits from operation would be greater than shown thereon.

**The Public Service Commission's recognition that conditions had so changed as to make the five cent joint rate established by the order of October 29, 1912, confiscatory.**

Since the making of the order of October 29, 1912, the prices of labor and material advanced from 75% to 100% over what they were in 1913. This was proven by the Belt Line Company's Exhibit BQ (R. p. 358), and no at-

tempt was made to dispute it. From this it follows, of course, that the purchasing powers of the two cents which the Belt Line Company was receiving under the order of October 29, 1912, was reduced by one-half.

The Public Service Commission recognized this increase in the cost of labor and materials and the decrease in the purchasing power of money as the same affected joint rates and transfer privileges as evidenced by its acts as follows:

1. On July 15, 1919 the Public Service Commission authorized the New York Railways Company to charge two cents for transfers *from and to cars operated solely by it* thus making the fare when a transfer was given and received seven cents, all of which seven cents was and is retained by the one company, the New York Railways Company (Exhibit CH, R. p. 393).

This additional charge of two cents for a transfer between the cars of the New York Railways Company is still in force notwithstanding the Transit Commission has the power to change it.

2. On October 24, 1919 and February 27, 1920, the Belt Line Company was permitted by the Public Service Commission to at once put into effect new tariff schedules whereby the joint rate between its 59th Street crosstown line and the Eighth and Ninth Avenue north and south lines and the Madison Avenue north and south line, was eliminated from the order of October 29, 1912 and the joint rate of five cents was no longer in effect on those lines (Exhibits K and L, R. p. 302).

3. The third act by which the Public Service

Commission has recognized that the order of October 29, 1912 was confiscatory by reason of changed conditions is its finding to that effect in its order of July 9, 1920 (Exhibit K annexed to Bill of Complaint, R. p. 302, which was Exhibit R before the Master, R. p. 305). In that order of July 9, 1920, made in a proceeding instituted by the Belt Line Company and the New York Railways Company to be relieved of the joint rate now in question, the Public Service Commission found

“ \* \* \* that the maximum joint rate of five cents fixed in the said order of October 29, 1912, is, by reason of the changed conditions under which the Railroad Companies are operating, unjust, unreasonable, and *insufficient to render a fair and reasonable return for the service furnished.*”

**The proof showing that the five cent joint rate fixed by the order of October 29, 1912, was confiscatory.**

Here again, in the language of the counsel for the transit Commission, there is “no conflict of testimony.” The interlocutory injunction whereby the Belt Line company was relieved from the five cent joint rate now in question and under which it was receiving only two cents from each joint rate passenger was put into effect on February 1st, 1921. The proof, therefore, naturally divides itself into two periods: (1) before the interlocutory injunction and (2) after such injunction.

*The results of operation before the interlocutory injunction.*

The results of operation from March 2, 1913, the date of the beginning of the operation of the Belt Line Company, until October 31, 1920—the latest date to which the financial statements could be compiled at the time of the filing of the Bill of Complaint—are set forth in Exhibit J attached to the Bill of Complaint (R. p. 46) which was received in evidence before the Master as Exhibit Y (R. p. 137). This exhibit shows that after deducting a return of only 5% on the actual amount of the indebtedness, \$1,823,091.53, and without making any allowance for depreciation, the Belt Line Company operated at a deficit in the years ending June 30, 1917, 1918 and 1920 and the four months ending October 31, 1920. In the year ending June 30, 1919, there was only \$7,159.11 to be applied toward depreciation and a full return on the value of the Belt Line Company's property.

Exhibit Y (Exhibit J annexed to the complaint) also shows that on October 31, 1920 the accumulated deficits of the Belt Line Company were \$201,270.13.

One of the causes of these deficits is shown by Exhibits F, G, H and I annexed to the complaint (R. pp. 40-46) which were Exhibits U, V, W and X before the Master (R. p. 306). These exhibits show that the total number of passengers carried at five cents and at two cents (the two cent passengers being the joint rate passengers) and the cost per passenger were as follows:

3225-34  
270206  
24

37 578 143  
59.058 383)

2592734

3 R

Year ended June 30th	Passengers at 5c each	Passengers at 2c, being joint rate passengers	Cost per passenger including operating ex- penses and taxes but not including depreciation and interest charges	Cost per passenger ex- clusive of de- preciation but including in- terest at 5% on \$1,823,091.53
1918	6,450,687	13,512,033	2.75c	3.20c
1919	5,440,766	12,817,674	2.49c	3.00c
1920	7,186,735	10,171,479	2.93c	3.46c
4 months ended October 31, 1920	2,402,202	3,077,007	3.40c	3.96c

21430290 37.578143

The proof is therefore conclusive that the 2 cents which the Belt Line Company was receiving from each joint rate passenger was far less than even the actual operating expenses of transporting such passenger, without considering at all any depreciation nor any return whatsoever on its property.

*The results of operation after the interlocutory injunction.*

Exhibits BE, BF and BG (R. pp. 330-334) show as follows:

Year ended June 30th	Passengers at 5c each	Passengers at 2c, being joint rate passengers	Cost per passenger including operating ex- penses and taxes but not including depreciation and interest charges	Cost per passenger ex- clusive of de- preciation but including in- terest at 5% on \$1,823,091.53
1921	8,119,325	7,948,148	3.52c	4.10c
1922	8,100,009	5,720,102	2.92c	3.58c
3 months ended September 30, 1922	1,690,229	1,426,923	3.03c	3.77c

\* Only five months of this year ended June 30, 1921, were after the injunction.

1009563  
15095173  
2216248  
291

1009563  
15095173  
331097361

The results of operations in the above periods after the injunction were as follows:

*Year ended June 30, 1921.*

Only five months of this year were after the injunction.

For this year there was a deficit of \$56,344.44 after deducting an interest charge of only 5% on the amount of the indebtedness (\$1,823,091.53) and without making any allowance for depreciation.

*Year ended June 30, 1922.*

In this year, after deducting only 5% on the amount of the indebtedness (\$1,823,091.53) and without allowing anything for depreciation, there was available for depreciation and for a balance of full return on the value of the property, \$65,665.41. Exhibit BH (R. p. 336) shows that the depreciation for that year was \$47,192.55, which would leave \$18,472.86 for the balance of the full return. The amount necessary to make an additional 1% on the amount of indebtedness and a return of 6% on the value of the property over and above the amount of the indebtedness is \$64,844, thus making an actual deficit of \$46,372 for the year ended June 30, 1922, after including depreciation and a return on the value of the property.

*Three months ended September 30, 1922.*

Exhibit BG (R. p. 334) shows that for these three months, after deducting only 5% on the amount of the indebtedness (\$1,823,091.53), without making any allowance for depreciation, there was available for depreciation and for return on the value of the property \$4,098.77. The amount charged for depreciation for these three

months is \$11,111.49 (Exhibit BH, R. p. 336) leaving an actual deficit of \$7,012.72. If there is also deducted the amount necessary to make up the full return of 6% on the value of the property, this deficit for these three months is increased by \$16,211, making a total deficit of \$23,223 for these three months.

*Twenty months period after the injunction (February 1, 1921, to September 30, 1922).*

Exhibit BC (R. p. 326) shows that the result of the operations for these twenty months was a balance of \$48,583.29 available for depreciation and a full return on the balance of the \$2,600,000 property investment, not included in the \$1,823,091.53, on which 5% had been deducted for that period. If this additional return on the balance of the property valuation is computed for the twenty months covered by this exhibit, there is a deficit of \$59,492.46, without making any allowance whatever for depreciation. This is shown by the following computation:

Additional return at 1% on \$1,823,091 for 20	
months .....	\$30,384.85
6% on \$776,909 (\$2,600,000 minus	
\$1,823,091 equals	
<hr/>	
776,909) for 20 mos. ....	77,690.90
<hr/>	
Total .....	\$108,075.75
Deducting balance as shown by Exhibit BC	
(R. p. 326) available for depreciation and	
return on capital.....	48,583.29
<hr/>	
Deficit for return on capital.....	\$59,492.46

If to the above deficit depreciation were added, the deficit would, as stated above, be even greater.

From the above statements it appears—and in fact is undisputed—that even in the period after the injunction, when the Company had been relieved from carrying the joint rate passengers from whom it received only two cents, the earnings of the Belt Line Company were \$59,492.46 less than the amount required to pay return of 6% on the \$2,600,000, and this deficit would be increased by the amount necessary to be set aside for depreciation.

Furthermore, on September 30, 1922, the total accumulated deficit was \$436,248.40 (R. p. 337).

**Comparison of the Number of Passengers Carried Before and After the Cutting Off of Joint Rate by Interlocutory Injunction.**

During the year ended June 30th, 1920 (the last fiscal year prior to the cutting off of the joint rate under the injunction herein), the revenue passengers carried were as follows (R. p. 44) :

7,186,735 passengers at 5c each

10,171,479        "        " 2c        "

531,876 free transfer passengers (not covered by joint rate)

17,890,090 Total passengers

During the year ended June 30th, 1922 (the first fiscal year after the cutting off of the joint rate under the injunction order herein), the revenue passengers carried were as follows (R. p. 332) :

8,100,009 passengers at 5c each  
 3,308,658        "        2c        (Third Avenue)  
 2,411,444        "        2c        (42nd Street)  
 418,988 free transfer passengers (not covered by joint  
 rate)

14,239,099 Total passengers

Thus the Belt Line Company carried 3,650,991 less passengers in the year after the injunction—when the joint rate covered by the injunction in this case was not in effect—than in a corresponding year before the injunction under the joint rate order.

In other words, there was a reduction of 10,000 passengers per day carried by the Belt Line Company on its 59th Street Crosstown Line by reason of the injunction and consequent cutting off of the joint rate between the lines of the Belt Line Company and the lines of the New York Railways Company and the Second Avenue Railroad Company. The Belt Line Company carried in the year ended June 30th, 1922, 20.4% less passengers than in the year ended June 30th, 1920; if the comparison is reversed, and if the Company during the year ended June 30th, 1922, had carried the same number of passengers as in the year ended June 30th, 1920, the increase would have been 25%.

A comparison between the period from February 1, 1919 to September 30th, 1920, which was entirely before the injunction, and the period from February 1st, 1921 to September 30th, 1922, which was entirely after the injunction, shows that in the twenty months prior to the injunction (February 1, 1919 to September 30, 1920) the Belt Line Company carried on its 59th Street Line 28,623,-060 passengers (Exhibit BD, R. p. 328), and in the twenty

months after the injunction (February 1, 1921 to September 30, 1922) it carried on its 59th Street line 23,550,706 passengers, a difference of 5,072,354, or a difference of 8453 passengers per day. In terms of percentages, the Belt Line Company carried 17.7% less passengers in the twenty months after the injunction (February 1, 1921 to September 30, 1922) than in the twenty months prior to the injunction (February 1, 1919 to September 30, 1920), and if the Belt Line Company had carried as many passengers in the twenty months after the injunction (February 1, 1921 to September 30, 1922) as it carried in the twenty months prior to the injunction (February 1, 1919 to September 30, 1920), the increase would have been 21.5%.

Likewise, there is no dispute concerning what the effect would have been had the Company been required to carry in the period after the injunction 20% to 25% more passengers than it did carry in that period.

**The Elimination of Joint Rate Passengers from each of whom the Belt Line Company would have Received Only Two Cents, Saved the Belt Line Company from the Operation of Additional Car Mileage and from Additional Expense.**

Here again there is "no conflict of testimony."

It is undisputed that at the time the injunction was granted—January, 1921,—travel on the Belt Line Company's 59th Street Crosstown Line had reached the point where, if it still continued to carry the number of passengers it was then, and had been prior thereto, carrying, it would have had to materially increase its car mileage, which is equivalent to saying increasing its expense.

This fact is shown not only by the testimony of Mr.

William E. Thompson, the Superintendent of Transportation of the Belt Line Company, but also by the written demands of the Public Service Commission itself. Mr. Thompson testified (R. p. 141) that prior to January 31st, 1921 (the interlocutory injunction went into effect February 1st) the condition of street railway travel on 59th Street was badly overcrowded and in his opinion had reached the point where more cars were necessary to furnish adequate service for the travel which was offering.

The following are instances of the written demands made by the Public Service Commission on the Belt Line Company to increase the number of cars—and this would mean an increase in car mileage.

1. Exhibit XA (R. p. 307) shows that prior to November 13th, 1919, the Public Service Commission had been insisting upon more cars on the 59th Street Crosstown Line, and that on that date the Commission again referred to the "enormous over-loading" and directed the Belt Line Company to advise the Commission "what action you will take in the matter."

2. That the discontinuance of the joint rate between the Belt Line Company and the New York Railways Company and the Second Avenue Railroad Company would relieve the Belt Line Company from increasing its car mileage as demanded by the Public Service Commission, is shown by the first paragraph of Exhibit YA (R. p. 308), which is a letter from the Public Service Commission to the President of the Belt Line Company. In this letter, however, the Commission calls attention to the fact that such joint rate is still in effect (not-

wi~~th~~standing the petition of the New York Railways to the Federal Court for the right to discontinue such joint rate), and refers to its demand for an increase in car mileage under date of November 13th, 1919 (Exhibit XA, R. p. 307), and after stating that the overloading is excessive, flatly requires the Company "to increase the service during both the morning and rush hours."

3. Exhibit Z (R. p. 311) which is a letter from the Public Service Commission to the President of the Belt Line Company, dated April 5, 1920, again requires the Company to increase the service.

4. Exhibit BA (R. p. 314) is a letter from the Public Service Commission to the President of the Belt Line Company, dated November 12th, 1920, again referring to "excessive overloading" on the 59th Street Crosstown Line, and requires the Company to "immediately" operate sufficient additional cars to provide a number of seats equal to the number of passengers carried in both non-rush hour and rush hour periods.

5. Exhibit BB (R. p. 321) is a letter from the Public Service Commission to the President of the Belt Line Company, dated November 16th, 1920, in which the Commission states that the Belt Line Company is giving "inadequate service" on the 59th Street Crosstown Line, and requires the Belt Line Company to operate additional cars.

It should be noted that the requirements for increase in car mileage made by the Commission in its letters of November 12th and November 16th, 1920 (Exhibits BA

and BB) were at the very time when the Commission had pending before it the Belt Line Company's application for relief from the joint rate order of October 29th, 1912.

The above demands of the Public Service Commission were referred to by the learned District Judge in his opinion, as follows (R. p. 118):

"That the cars in service, prior to the issuance of the injunction, were 'enormously overcrowded' is established by the letters of the Public Service Commission calling attention thereto."

That the Belt Line Company was, by the interlocutory injunction cutting off the joint rate, saved from increasing its car mileage as demanded by the Public Service Commission, is shown by the undisputed fact that the number of passengers carried after the injunction was from 8,000 to 10,000 less per day—a reduction of 17% to 20%. The Belt Line Company would have had to substantially increase its operating expenses if it had continued to carry the joint rate passengers, and the fact that if the Company were again required to carry all joint rate passengers, its operating expenses must be substantially increased, was undisputedly proven not only by the testimony of its own witnesses but by the testimony of the Transit Commission's own witness.

Mr. Thompson, the Superintendent of Transportation of the Belt Line Company, testified that during the twenty months period after the injunction (February 1st, 1921 to September 30th, 1922), the cars operated by the Belt Line Company on 59th Street could not have carried an appreciable number of additional passengers, and that any increase in the number of passengers would have required the addition of cars in the same proportion.

In other words, he testified that the car mileage would increase in the same proportion that the street car travel increased (R. p. 166).

This testimony stands undisputed in the Record.

Mr. Farrington, the Auditor of the Belt Line Company, testified that on the average the expenses increase in the same proportion as the mileage increases (R. p. 171).

This testimony is also undisputed in the Record.

Mr. William O. Smith, the Supervising Transit Inspector of the Transit Commission, one of the appellants here, after testifying to an experience of over fifteen years in the service of the Transit Commission and its predecessors in office (R. p. 255), testified that **even at the present time** (January 25, 1923) **with the millions of joint rate passengers eliminated** (8,000 to 10,000 passengers less per day), **the service on 59th Street should be increased 10%** (R. pp. 249, 250).

From this testimony of the Transit Commission's own Supervising Transit Inspector, given on direct examination by the counsel for the appellant here, Transit Commission, it follows that if the *present* service, when the joint rate complained of is not required, is insufficient for the *present* needs and requires 10% more car mileage, then surely if the millions of joint rate passengers were added to the number carried on 59th Street (based on years prior to the injunction, the increase would be from 20% to 25%), there would, in the period subsequent to the injunction, have been substantial increases in the operating expenses of the Belt Line Company.

Concerning this the District Judge stated (R. p. 118):

**"If the transfer passengers should again be carried, the service would be as bad as before, unless**

there should also be a substantial increase in plaintiff's car mileage. The character of service to be rendered by a public service utility is not, as such, a matter which concerns this Court. But even so, the facts, as the evidence shows them to be, cannot be overlooked, and reasonable inferences are to be drawn. One of such (fol. 196) facts is, that even now, with the injunction as to the five cent transfer order in effect, there should be an increase of ten per cent. in plaintiff's car mileage. If five to six thousand more transfer passengers per day are to be added to the total number of persons now being carried, it is plain as a pikestaff that plaintiff must necessarily increase its expenses by a very considerable amount."

Just how much worse off the Company would have been during the post-injunction period if the injunction had not been granted and if the Belt Line Company was required to carry the joint rate passengers at two cents each, is conclusively shown by Exhibit BP (R. p. 256).

This Exhibit BP shows the income from operation for the 20 months after the injunction (Feb. 1, 1921 to September 30, 1922), during which the joint rate involved in this case was not in effect, adjusted to what it would have been if the same number of five-cent and two-cent passengers had been carried during that period as were actually carried during the 20 months previous to the injunction (Feb. 1, 1919 to September 30, 1920) during which the joint rate herein complained of was in effect.

As shown by that Exhibit BP, the Belt Line Company carried over 5,000,000 less passengers in the 20 months after the injunction than during the corresponding 20

months prior to the injunction. In other words, if the Company had, during the 20 months after the injunction, carried the same number of passengers as it did in the 20 months prior to the injunction the increase would have been  $21\frac{1}{2}\%$ .

It is undisputed in this case that the operating expenses increase in the same proportion as the number of passengers increase.

This Exhibit BP shows that for the 20 months after the injunction there was available for depreciation and for return on the balance of the capital stock over and above the funded indebtedness \$48,583.29. This is the same figure as is shown on Exhibit BC (R. pp. 326-327).

As we have previously shown, if this sum of \$48,583.29 were applied to make up a 6% return on \$2,600,000, there would have been a deficit for the operation for this period of \$59,492.46 without making any allowance for depreciation. In other words, even before there is any attempt to re-adjust the results of operation during the 20 months after the injunction on the basis of what they would have been if the Company had been required to carry additional passengers at two cents and thus incurred additional expense, there was an actual loss of over \$59,000, which must be increased by the amount necessary to make up depreciation.

Exhibit BP, however, shows that on the basis of what the Company would have received and paid out if it had been required to carry the same number of passengers as it did carry during the corresponding period prior to the injunction, there would have been a loss, even on the basis of only a 5% return on the amount of the indebtedness (\$1,823,091.53) of \$115,424.59 (Record Insert p. 356).

If, however, a return of 6% on \$2,600,000, to which the

Belt Line Company is entitled, were to be taken in place of only 5% interest on only \$1,823,091.53, there would be an actual deficit of \$217,755.55, and without any allowance for depreciation. This deficit of \$217,755.55 is arrived at as follows:

	Adjusted Income per Ex. BP	Adjusted income Substituting 6% on \$2,600,000 in place of Bond and Note Interest
Revenue .....	\$ 950,764.28	\$ 950,764.28
Oper. Exp. & Taxes	908,519.83	908,519.83
Interest on bonds.	145,833.34	6% on \$2,600,000 for 20 Mos. 260,000.00
Interest on Notes.	6,974.70	
Amortization of Bond Discount..	4,861.00	
Total Deduction ..	\$1,066,188.87	\$1,168,519.83
Net Adjusted Loss.	\$ 115,424.59	\$ 217,755.55

If Exhibit BP were reconstructed on the basis of the same number of passengers as were carried in the corresponding 20 months prior to the injunction (an increase of 21%) and on the basis of only 10½% increase in the expenses, there would have been a loss of \$36,586.09, and if an amount necessary to make up a full return of 6% on \$2,600,000 is included in the calculation, the loss, on the basis of only 10½% increase in expenses, would have been \$138,917.05. The following tables show this calculation:

Operating expenses shown on Exhibit BP...	\$750,842.84
An increase of 10½% would be.....	78,838.49
Operating expenses adjusted as above..	\$829,681.33
Interest on 1st Mortgage 5% Bonds.....	145,833.34
Interest on notes payable at 5%.....	6,974.70
Amortization of Bond Discount.....	4,861.00
 Total .....	\$987,350.37
Amount of adjusted income.....	950,764.28
 Loss .....	\$ 36,586.09
Adjusted income per Ex. BP.	Adjusted income on basis of 10½% increase in operating expenses instead of 21% increase used on Exhibit BP
Revenue .....	\$ 950,764.28
 Oper. Exp. & Taxes	908,519.83
Interest on Bonds.	145,833.34
	6% on \$2,600,000
	for 20 Mos. 260,000.00
Interest on Notes.	6,974.70
Amortization of Bond Discount..	4,861.00
 Total Deduction...	\$1,066,188.87
 Net Adjusted Loss. \$ 115,424.59	\$ 138,917.05

**BRIEF OF THE ARGUMENT.**

1. The Belt Line Company properly invoked the jurisdiction of the District Court.
2. The order of October 29th, 1912, was not a service order or requirement.
3. The Joint Rate Order of October 29th, 1912, is confiscatory.
4. The Belt Line Company is entitled to complain of the joint rate order of October 29th, 1912, as an infringement of its constitutional right.
5. There has been no action or conduct on the part of the Belt Line Company which gives any foundation whatever for the Appellants' claim that it is not entitled to equitable relief.
6. The District Court did not find, as claimed by Appellant Banton in his brief, that there was only a loss of \$4,000 per annum on the joint rate traffic cut off by the injunction herein.
7. The Appellant Banton's argument in his Point II that the Belt Line Company would, if it resumed the joint rate traffic, earn a fair return on the property is contrary to the evidence herein.
8. The valuation of the Belt Line Company's property found by the Master and approved by the District Court was justified by the evidence.

**POINT I.**

**The Belt Line Company properly invoked the jurisdiction of the District Court.**

This point is in answer to Point IV in the brief of the appellant, Transit Commission, in which it is contended

(1) That the rate-making process was not completed because the case before the Public Service Commission had not been finally submitted on the rehearing before the Commission, and

(2) That the rate-making process had not even been initiated because of the agreement between the carriers involved for the division of the rate under which the Belt Line Company received two cents as its share of the five-cent joint rate.

(1)

The contention that the rate-making process had not been completed because the rehearing before the Public Service Commission had not been finally closed or the matter had not been "finally submitted" on such rehearing, is summarily disposed of by the decision of this Court in *Prendergast v. New York Telephone Co.*, 262 U. S. 43, in which this Court held (p. 48, *italics ours*) :

*"It was not necessary that the company should apply to the Commission for a rehearing before resorting to the Court. While under the Public Service Commission Law any person interested in an order of the Commission has the right to apply for a rehearing, the Commission is not required to grant such rehearing unless in its judgment sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement except as the Commission may direct, and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order (§22) as the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission,*

we see no reason for requiring it to be made as a *condition precedent to the bringing of a suit to enjoin the enforcement of the order*. See, by analogy, *Hollis v. Kutz*, 255 U. S., 452, 454; *Re Arkansas Rate Cases* (C. C.), 187 Fed. 290, 306; *Atlantic Coast Line v. Interstate Commission* (Com. Ct.), 194 Fed. 449, 452; *Baltimore Railroad v. Railroad Commission* (C. C.), 196 Fed. 690, 693, 699; and *Chicago Railways v. Illinois Commission* (D. C.), 277 Fed. 970, 974. In *Palermo Water Co. v. Railroad Commission* (D. C.), 227 Fed. 708, the statute specifically provided that no cause of action should accrue in any court out of any order of the Commission unless an application for a rehearing had been made. Here the Commission did not suggest in its answer that it perceived any ground upon which it would have granted a rehearing, if an application had been made, but, on the contrary, maintained the correctness of its orders in all respects. *Manifestly under such circumstances the injunction should not have been denied merely because application had not been made to the Commission for a rehearing.*"

To the same effect also is the decision of this Court in *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, wherein Mr. Justice Brandeis states (p. 282):

"Despite the failure to apply for a rehearing, the Court had jurisdiction to entertain this suit. *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 48, 49. Compare *Chicago Rys. Co. v. Illinois Commerce Commission*, 277 Fed. 970, 974."

The decision in the *Prendergast* case was based upon the same §22 of the Public Service Commission Law which

the appellant, Transit Commission, quotes at page 43 of its brief, and is the same section which brings about the same situation in this case.

If it was not necessary to even apply for a rehearing before applying to the Federal Court for relief, certainly it is not necessary to even consider the claim of the appellants that the matter had never been "finally submitted" to the Public Service Commission on the rehearing.

**The contention of defendants that the matter was not "finally submitted" on rehearing, is not supported by the facts and is a pure afterthought.**

While no discussion of this is necessary, in view of the decision of this Court in *Prendergast v. New York Telephone Co.* (*supra*), we believe the Court should know that the Public Service Commission (the predecessor of the Transit Commission) has expressly and squarely admitted that the matter was "finally submitted" to it on the rehearing.

The complaint in this case expressly alleges (subd. XII, fol. 16, R. p. 10, italics ours) :

" . . . and on the 10th day of November the matter was *finally submitted* to the Public Service Commission of the State of New York for the First District, and the case was closed.

"The Public Service Commission of the State of New York for the First District has refused and neglected for more than thirty days to determine the matter *submitted* on such rehearing contrary to and in violation of the provisions of Section 22 of the said Public Service Commissions Law of the State of New York."

In its answer the Public Service Commission alleges as follows (italics ours) :

"VIII. Admits each and every allegation contained in that paragraph of the Bill of Complaint marked or numbered XII except that it denies that the Public Service Commission of the State of New York for the First District has 'refused' for more than thirty days to determine the matters *submitted to it at such re-hearing*, and denies that the neglect of the Public Service Commission of the State of New York for the First District to determine matters *submitted on such re-hearing* is 'contrary to and in violation of the provisions of Section 22 of said Public Service Commissions Law of the State of New York' as alleged in folio 45 of said paragraph XII, and further denies each and every allegation contained in folios 46 and 47 of said paragraph XII of the Bill of Complaint."

In other words, by its answer in this case the Public Service Commission admitted the allegation that on the 10th day of November the matter was *finally submitted* to the Public Service Commission of the State of New York for the First District.

Again, by its answer in this case the Public Service Commission "for a first separate and distinct defense to complainant's alleged cause of action," alleged as follows:

"Said Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, further answering the Bill of Complaint herein, and for a first separate and distinct defense to complainant's alleged cause of action, alleges:

"XII. Upon information and belief, that complainant has an adequate remedy at law by pro-

curing a writ of mandamus compelling this defendant to make a determination in respect of the matters *submitted to it on the re-hearing of the application* of the Belt Line Railway Company for a modification of the order of October 29, 1912, and by reviewing on a writ of certiorari in the Appellate Division of the Supreme Court of the State of New York, said determination of this defendant if it is unsatisfactory; and that complainant has a further adequate remedy at law by making application to this defendant under Section 49, subdivision 1 of the Public Service Commissions Law of the State of New York, for a general increase in fare over its entire line."

Moreover, this action was commenced on December 16th, 1920, the motion for an injunction *pendente lite* was argued on December 30th, 1920, and the injunction was granted on January 26th, 1921, during all of which time the Public Service Commission could have rendered a decision.

The fact that the pleadings expressly admit that the matter was finally submitted on the re-hearing, is a conclusive answer to the statement on page 44 of the appellant, Transit Commission's brief to the effect that the Belt Line Company introduced no evidence before the Master that it had requested the Commission to determine the re-hearing or that the Commission had refused to do so.

The statement on page 43 of the Transit Commission's brief that the Commission did not take any action on the Belt Line Company's application for a rehearing "but waited for the Receiver to act" is belied by the fact that although it acted on the Receiver's application for a re-

hearing on August 31st, it never acted on the Belt Line Company's application for a rehearing until November 4th.

Before closing the discussion on this point, however, it is necessary to call attention to the statement on page 46 of the brief of counsel for the Transit Commission, in which, referring to the fact that there was correspondence between Messrs. Winthrop & Stimson, counsel for the Receiver of the New York Railways Company, and the Public Service Commission (Exhibits DD, DE, DF, R. pp. 426-429), the statement is made that:

"\* \* \* there was an ingenious manipulation of procedure by one party, resulting in a short delay, while the other party (this plaintiff) prepared its bill and moving papers and invoked federal jurisdiction."

If this statement means anything, it means that Messrs. Winthrop & Stimson and the attorney for the plaintiff in this case were in collusion and Messrs. Winthrop & Stimson were engaged in delaying action by the Public Service Commission in order that the Belt Line Company might invoke federal jurisdiction. In making such a statement counsel for the Transit Commission have overstepped the bounds of fair argument and have made a statement which they can in no wise substantiate, and of which there is, and can be, no proof and which is contrary to the fact. The fact that there was correspondence between Messrs. Winthrop & Stimson and the Public Service Commission concerning certain corrections in the minutes was unknown to the Belt Line Company or its counsel, was apparently unknown to, or if it was known it was concealed by, the counsel for the Public Service Commission who drew its answer in this case. In its answer the Public

Service Commission admitted that the rehearing had been finally submitted to it.

This act of the counsel for the Transit Commission in making the statement above quoted is all the more unfair because they have never before intimated such a thing until the District Court below had before it the confirmation of the Master's report and the granting of the final decree; in other words, they have not made such a charge "in the open" at a time when Messrs. Winthrop & Stimson and the attorney for the Belt Line Company could have refuted any such insinuation under oath.

(2)

The claim that the Belt Line Company's resort to the Federal Court was premature as well as unfounded because the Belt Line Company's two-cent share of the five-cent joint rate established by the Commission was never fixed by the Commission but was agreed upon by the interested parties, is conclusively answered by the decision of this Court in *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585. In that case the Supreme Court of the United States enjoined the enforcement of a joint rate *notwithstanding that the company had agreed upon the basis of a division of the joint rate without any appeal to the board of railroad commissioners*. In that case even the State Court which upheld the rate refused to base its decision upon the agreement of the connecting carriers concerning the division of the joint rate.

**The Joint Rate Order of October 29, 1912 Was In Invitum Both with Respect to the Central Park Company and the Belt Line Company.**

The order of October 29th, 1912 was imposed on the railroad companies therein named *in invitum*.

The brief for the appellant, Transit Commission, states (p. 19) :

"The order of the Commission thus has the force and effect of a State law or statute."

In other words, the appellants predicate—as they must—their right to be in this Court on the basis of the order of October 29th, 1912 having the force of a State statute. There is certainly nothing voluntary about a State statute or law.

The order establishes through routes and joint rates.

The opinion of the Public Service Commission at the time it made the order of October 29th, 1912, states (Exhibit BV, R. p. 378, at fol. 594) :

"Under the provisions of subdivision 3 of Section 49 of the Public Service Commissions Law as amended in 1910, since the through routes and joint rates were not established by the companies within the time specified in the order of July 11, 1911, the Commission is now empowered in this proceeding to prescribe joint rates as a maximum to be charged and to require the companies within a specified time to agree upon the division of the joint rates."

The appellant, Transit Commission, emphasizes the fact that the Central Park Company (the Belt Line Company's predecessor) expressly accepted this order thus making the order a voluntary agreement on the part of the Central Park Company.

Pursuant to Subdivision 3 of §49 of the Public Service Commissions Law, a copy of which is set forth at page 4 of this brief, the order of October 29th, 1912, required the Central Park Company and the other companies there-

in named, on or before November 6th, 1912, "to notify the Commission whether the terms of this order are accepted and will be obeyed" (R. p. 17, fol. 37).

Thus, the Central Park Company was required by law to state that it would accept and obey or that it would not accept and would disobey. If it chose to notify the Commission that it would not accept and would disobey, the Central Park Company would be required to defend itself in criminal proceedings to punish it for such disobedience or to defend proceedings brought to enforce such order.

Naturally, the only basis upon which the Central Park Company could succeed in any of such proceedings would be on the ground that the order of October 29th, 1912, was *at that time* confiscatory.

Therefore, when the Central Park Company notified the Commission in writing (R. p. 391) that the order of October 29th, 1912, was accepted and would be obeyed, it was nothing more than a statement that it would not *at that time* contest the order.

The acceptance which the Central Park Company made, *required as it was by the statute*, was certainly not a voluntary agreement on the part of the Central Park Company that it would forever comply with the order of October 29th, 1912, after it became confiscatory.

Any statute which could require a public service corporation to accept a rate and forever foreclose itself from contesting that rate when it became confiscatory, would of itself have been unconstitutional and intolerable.

Moreover, the order of October 29th, 1912, shows on its face that it was subject to changed conditions because the order itself provides that the order shall "remain in force as to each through route and joint rate until modi-

fled or abrogated by further order of the Commission" (R. p. 17).

Nor does the agreement made between the plaintiff's predecessor, Central Park Company, and the other corporations affected by the order of October 29th, 1912, with reference to the division of the rate *so fixed by the Commission* prevent any party to such joint rate from contesting it.

Subdivision 3 of §49 of the Public Service Commissions Law, which is the statutory authority for the order of October 29th, 1912, contains the following provision:

"\* \* \* and in case such agreement be not so made within the time so specified the commission may declare by supplemental order the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled, and the manner in which the same shall be paid and secured; such supplemental order shall take effect as part of the original order from the time such supplemental order shall become effective."

Therefore, when the Central Park Company, under the compulsion of the order of October 29th, 1912, as well as under the compulsion of the statute, agreed on a division of the joint rate, this act certainly was not voluntary.

Furthermore, the division of the joint rate, whereby the Belt Line Company received two cents and the intersecting carriers having the long north and south haul, received three cents, is the most favorable division which the Belt Line Company could obtain. This is established both by the pleadings and by the undisputed testimony.

In Subdivision 7 of the complaint (fol. 6, R. p. 4), it is

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X/ stated that the ratio between the distance which a through route passenger could travel over the lines mentioned in the order of October 29th, 1912, other than the 59th Street line of the Belt Line Company, as compared with the distance which such a passenger could and can travel over the 59th Street Line of the Belt Line Company under the order, was and is not less than three to two, which was the ratio used in fixing the division of the joint rate of five cents established by the order of October 29th, 1912. This allegation was not denied by the Public Service Commission (the *predecessor* of the Transit Commission), and on the trial of this case the Belt Line Company proved this allegation by the witness William E. Thompson, and the defendants made no attempt to dispute that proof. In other words, the only proof in the Record is the ratio of the length of haul. Therefore, the vague intimations of counsel for the Transit Commission that some other facts might be material in the division of the said joint rate, are beside the point and render inapplicable the citation of *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274.

X/ The half-hearted statement by the counsel for the Transit Commission on page 46 of their brief that

X/ "It may well be that if the plaintiff had insisted on a larger share and had applied to the Commission for relief, a different apportionment would have been made"

does not merit serious consideration in view of the fact that the Receiver of the New York Railways Company has ever since November 24th, 1919, been complaining of the three-cent share of the joint rate to which he was entitled (R. pp. 395-396) and by his counsel, Mr. Henry L. Stimson,

joined as *amicus curiae* in the application for the interlocutory injunction herein (R. p. 67). ✓

Another conclusive answer to the contention of the appellants that the rate-making process had never been initiated or concluded, is found in the fact that not only was the order of October 29th, 1912, *in invitum* with respect to the Central Park Company but the Public Service Commission made the order also *in invitum* so far as the Belt Line Company was concerned by annulling the revised tariffs filed by the Belt Line Company with the Public Service Commission on May 22nd, 1920, which revised tariffs eliminated the joint rate between the 59th Street Line of the Belt Line Company and the other lines named in the order of October 29th, 1912, excepting the lines of the Third Avenue Company and the Forty-second Street Company (Exhibit BL, R. pp. 335-347).

These tariffs were to become effective on June 22nd, 1920, and on June 8th, 1920, the Public Service Commission suspended the tariffs until July 22nd, 1920 (Exhibit Q, R. p. 304). Under the order of July 9th, 1920, the Public Service Commission annulled the revised tariffs which the Belt Line Company had filed on May 22nd.

By §29 of the Public Service Commissions Law, a copy of which is hereto annexed and marked "Appendix B," the Belt Line Company could not change any rate or fare or any joint rate or fare "except after thirty days' notice to the Commission" and the filing of revised tariffs for thirty days. The orders of the Public Service Commission suspending and finally annulling the revised tariffs filed by the Belt Line Company were under §29. These acts of the Commission in suspending and finally annulling the revised tariffs filed by the Belt Line Company show the absurdity of the contention of the appellants that the joint

rate which we are seeking to enjoin was in any way voluntary, or was never initiated or completed.

If these tariffs had not been prevented from going into effect by the action of the Public Service Commission, the Belt Line Railway Company would have been relieved from carrying its joint rate passengers at a two-cent rate. Thus, the action of the Commission was an affirmative act in preventing the Belt Line Company from receiving any other rate than two cents from each joint rate passenger.

#### **POINT II.**

**The order of October 29th, 1912, was not a service order or requirement.**

The appellant Transit Commission, in Point II of its brief (p. 20) contends that the order of October 29th, 1912 was a service order, and in its Point III argues (p. 42) that a service order or requirement should not be held confiscatory unless it imposes an additional expense unreasonably in excess of the added revenue which it produces, and then only if the total business fails to yield an adequate return. The fallacy of such arguments is readily apparent.

In the first place the proof shows that the order of October 29th, 1912, would, but for the injunction herein, have imposed an additional expense unreasonably in excess of the added revenue (if any) which it would have produced, and that the Belt Line Company does not earn a fair return on its entire business.

In the second place the order of October 29th, 1912 was not a service order or requirement.

The methods of travel and the accommodations offered for travel were the same after as before the order of October 29th, 1912. They are the same now. Physical transfers from the cars of one company to the cars of another company were necessary on 59th Street before the order was made, as they were after the order was made, and as they are now.

In other words, the 59th Street Crosstown Line is just as much of a link "in the chain of transportation of passengers who wish to go up or down town and also east or west"\*, whether the order of October 29th, 1912 is in effect or not. The order of October 29th, 1912 merely changed the rate of fare which the passengers using these lines must pay.

Therefore, the order of October 29th, 1912 was not a service order but was a joint rate order between independent companies.

The appellants cite the decision of this Court in *Chesapeake & Ohio Railway v. Public Service Commission*, 242 U. S. 603, as authority for the proposition that a service order will not be held unreasonable, confiscatory and invalid merely because it involves or may involve some loss. That case is not applicable for two reasons:

(1) The order of the Public Service Commission which was upheld in that case was a service order because it required more trains and was not the fixing of a rate between two independent carriers; and

(2) The order of the Public Service Commission was sustained because its requirement was an

\*NOTE.—The quotation is from page 20 of appellant, Transit Commission's brief.

obligation which the company accepted in its franchise, but such reasoning cannot possibly apply to this case because there was certainly no franchise requirement for the Belt Line Company to maintain a joint rate with an independent company.

Nor is the case of *Georgia Railway Co. v. Decatur*, 262 U. S. 432, cited by the appellant, Transit Commission, on page 22 of its brief, applicable. In that case, the railway company, in consideration of being permitted to abandon certain of its lines, agreed to a specified rate and transfer arrangements, and it was this contract arrangement which the company later tried to avoid. The order which was upheld in the above case merely required the company to do what it had agreed to do, as well as requiring the company to provide more seats for passengers.

The quotation made by the appellant, Transit Commission, on page 21 of its brief from the case of *Railroad Commission v. Eastern Texas R. Co.*, 264 U. S. 79, (cited in appellant, Transit Commission's, brief as 68 U. S. [Lawyers' ed.] 309), shows on its face that it has no application to this case.

All of the above cases relied upon by the appellant Transit Commission involved purely service requirements or requirements to perform obligations under the respective companies' franchises, whereas, as above stated, the order of October 29th, 1912 was not a service order or an order to perform a franchise obligation, but instead was a joint rate order between independent carriers.

**POINT III.**

**The joint rate order of October 29th, 1912, is confiscatory.**

**1.**

As previously stated, the Public Service Commission on July 9th, 1920, "after a careful consideration of the testimony and briefs submitted by counsel," held (R. p. 48) that

"the maximum joint rate of five cents fixed in the said order of October 29th, 1912,\* is, by reason of the changed conditions under which the said railroad companies are operating, unjust, unreasonable and *insufficient to render a fair and reasonable return for the service furnished.*"

The counsel for the Transit Commission evidently consider the above finding of the Public Service Commission embarrassing and on page 30 of their brief on this appeal, after seeking to explain this finding, state:

"Moreover, the Commission never found that the five cent rate was confiscatory."

We respectfully submit that the language of the order of the Public Service Commission of July 9, 1920, wherein the Commission states that the joint rate of five cents fixed by the order of October 29, 1912, was, by reason of the changed conditions

"insufficient to render a fair and reasonable return for the service furnished"

is a correct definition of confiscation and its finding in those words equivalent to a finding of confiscation.

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\* Erroneously printed in Record as "1920."

We find nothing in the three cases cited by the Counsel for the appellant Transit Commission on page 31 of its brief which in any way supports the proposition that a rate may be unreasonable and inadequate without reaching the point of confiscation.

We call attention also to the fact that nowhere in their brief have Counsel for the Transit Commission referred to or quoted the actual language of the order of July 9th, 1920, to-wit, "insufficient to render a fair and reasonable return for the service rendered."

## 2.

The cost per passenger is far in excess of the two cents which the Belt Line Company would receive under the joint-rate order of October 29th, 1912.

It cannot be disputed that the cost of the Belt Line Company of carrying each passenger transported during the years hereinafter set forth, was as follows (R. pp. 40-46; 330-334) :

Year ended June 30th	Passengers at 5c each	Passengers at 2c, being joint rate passengers	Cost per passenger including operating ex- penses and taxes but not including depreciation and interest charges	Cost per passenger ex- clusive of de- preciation but including in- terest at 5% on \$1,823,091.53
1918	6,450,687	13,512,033	2.75c	3.20c
1919	5,440,766	12,817,674	2.49c	3.00c
1920	7,186,735	10,171,479	2.93c	3.46c
1921	8,119,325	7,948,148	3.52c	4.10c
1922	8,100,009	5,720,102	2.92c	3.58c
3 months ended September 30, 1922	1,690,229	1,426,923	3.03c	3.77c

*3 P without which*

During the twenty months after the injunction (February 1, 1921 to September 30, 1922), the cost of carrying each passenger was 3.84c. (R. p. 326) and if the receipts and expenses for this period are adjusted on the basis of the increase in traffic and the consequent increase in expenses if the same number of joint rate passengers had been carried during that twenty months period as in the corresponding twenty months period prior to the injunction, the cost of carrying each passenger would have been 3.72c. (Exhibit BP, R. Insert p. 356).

If a charge for depreciation is included and also the amount necessary to make up a full return on the actual value of the Belt Line Company's property, the cost of carrying each passenger is far in excess of the figures above given.

It is plain, therefore, that the order which requires the Belt Line Company to carry passengers at a joint rate under which it receives only two cents per passenger, which is far below the actual cost, is confiscatory.

The fallacy of the argument of the appellants to the effect that the more passengers the carrier carries the less the cost is per passenger is easily shown by the undisputed fact in this case that if the Belt Line Company had been required after February 1, 1921, to carry additional joint rate passengers it would have had to increase its car mileage, and therefore its expenses, in the same proportion as its passengers increased.

The Statutory Court based the interlocutory injunction granted in January, 1921, upon the facts above set forth.

The above facts formed one of the grounds on which the District Judge based the injunction now appealed from (fol. 197, R. p. 119).

The Counsel for the Transit Commission attempt to

make it appear that the District Judge based his decision in this case upon the above facts "with some reluctance". The opinion of the District Judge reveals no such reluctance. On the contrary, the District Judge distinctly states that the above facts constitute "another obstacle to the contentions put forth by defendants" (R. p. 119).

The soundness of the principle upon which the Statutory Court and the District Judge held that the plaintiff was entitled to relief from the joint rate order, is sustained not only by the particular facts in this case, but also by the decision of this Court in *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585. In that case, the Legislature of North Dakota had attempted to fix joint rates for transportation of lignite coal over the lines of two or more railroad companies. The Northern Pacific Railway Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company contested this rate. The State Court upheld the writ on the ground that

"\* \* \* the carriage of lignite coal increased 'the railroad expenses but sixty per cent. of the usual statutory rate for the lignite haul,' that is, that this percentage of the rate covered the 'out-of-pocket cost' of the traffic, the remaining expenses in this view being such as would have been incurred had no lignite coal been transported" (pp. 591, 592).

In holding that the "out-of-pocket cost" theory was improper, this Court (Justice Hughes) said (pp. 596-597, *italics ours*):

"\* \* \* We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are appli-

cable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. *That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry.* The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account."

We have italicized that portion of the above decisions of this Court which sets forth the theory on which the statutory court gave the interlocutory injunction which is also one of the grounds upon which the District Judge granted the final injunction now appealed from. In this case the Belt Line Company has (in accord with this Court's ruling in the above case) divided the expenses of

its business at a particular time by what it carried at that time, whether they were five-cent passengers or two-cent passengers.

The result of the same computation applied to this case as was approved by this Court in the case just cited is that the cost of carrying each passenger including the two-cent passengers is far in excess of the two cents received from such passenger.

The counsel for the Transit Commission in Point III of their brief, contend that the decisions of the Courts below in granting the Belt Line Company relief upon the above facts are "wholly unsound and erroneous," and, unable to refer to any authority in support of their contention, advance a most amazing argument, the fallacy of which is readily apparent.

This argument of the Transit Commission which we say is most amazing, is based upon the proposition that the Belt Line Company could, in the period after the injunction, have carried 8,000 to 10,000 additional passengers per day, an increase of from 20% to 25% with "practically no added expense." Counsel states on page 38 of their brief (italics ours):

+ +

"There will be no appreciable increase in expense *unless the added traffic requires more cars*; and the amount of increase may be fairly measured by the added expense of operating the additional cars and the increased car mileage, if any."

Again, on page 40, counsel are unable to advance their argument without presupposing that the carrying of the additional passengers (8,000 to 10,000 per day—20% to 25%) can be done "without increasing its scale of service," or "upon a given scale of service." The advancing of

such an argument by counsel for a regulatory commission in the State of New York is most disingenuous in view of the testimony in this case of the Transit Commission's own Supervising Transit Inspector, and the acts of its predecessor, Public Service Commission. Such an argument presupposes

- (1) that before the injunction (cutting off the joint rate) the Belt Line Company was operating sufficient cars for all the passengers, including the joint rate passengers;
- (2) that since the injunction the Belt Line Company is wasting service and running more cars than now required because of the cutting off of the joint rate passengers; and
- (3) that in the period after the injunction the Belt Line Company could increase its passengers from 8,000 to 10,000 per day (an increase of 20% to 25%) without increasing its service and its car mileage.

**Even the remotest possibility of any one of the above assumptions is conclusively negated by the positive and undisputed testimony of the Transit Commission's own Supervising Transit Inspector and the acts of its predecessor, the Public Service Commission (R. pp. 307-321).**

It is futile for counsel to base an argument upon the proposition that the Belt Line Company, prior to the injunction, was operating sufficient cars to handle all passengers, including the joint rate passengers, because the five letters from the Public Service Commission, the last

two of which were on November 12th and November 16th, 1920, called attention to the "excessive over-loading," and *summarily ordered the Belt Line Company to increase its service.*

It is absurd for counsel to argue on a supposition that in the period after the injunction the Belt Line Company was operating more cars than necessary due to the cutting off of the joint rate passengers, and to argue on the further supposition that the Belt Line Company could carry 8,000 to 10,000 more passengers per day (an increase of 20% to 25%) without increasing its cars and its car mileage, because its own Supervising Transit Inspector, William O. Smith, testified unequivocally, even on direct examination by the same counsel for the appellant, Transit Commission, as appears on this appeal that at that time (January, 1923) **even without the increase in passengers which would result from a resumption of the joint rate, the Belt Line Company should increase its cars and car mileage at least 10%.**

On page 38, counsel for the Transit Commission admit by their argument that there would be an appreciable increase in expense if the added traffic required more cars, and state that the increase in expense "may be fairly measured by the added expense of operating the additional cars and the increased car mileage". Not only does Mr. Smith, the Supervising Transit Inspector of the appellant, Transit Commission, state that *at the present time*, without the additional 8,000 to 10,000 more passengers per day resulting from the joint rate traffic, the Belt Line Company should operate at least 10% more service, but the undisputed testimony of Mr. Thompson unequivocally establishes as the fact in this case that if the joint rate passengers were again carried it would re-

quire the operation of additional cars and increased car mileage, the additional expense of which would be in the same proportion as the increase in the number of passengers carried.

The attempted comparison between the manufacture and distribution of gas and the travel on street surface railways (pp. 39 and 40 of appellant, Transit Commission's, brief) is likewise fallacious because it is based on the supposition that the street railway company can carry more passengers "without increasing its scale of service," and as we have shown, no one should know better than the counsel for the Transit Commission that any such supposition is contrary to the proven facts in this case.

The observation by the counsel for the Transit Commission on page 39 of their brief, that

"it is good business policy for a carrier to take such additional revenue as it can get, rather than to wait in vain for patronage which will not come at higher rates",

is shown to be based upon a false premise by reference to Exhibits BC and BD (R., pp. 326 and 328), which show that during the twenty months' period after the injunction (February 1, 1921 to September 30, 1922) the Belt Line Company carried 13,426,836 five-cent passengers, as compared with 9,846,013 five-cent passengers in the corresponding twenty months prior to the injunction.

This shows that a very large number of the passengers who formerly rode on Belt Line Company's cars under the joint rate fare, from whom the Belt Line Company received only two cents, are now being carried by the Company at a full five-cent rate.

## 3.

The appellants have sought to uphold the joint rate order of October 29th, 1912 on the theory, unsupported by any facts in this case, that the expenses of a resumption of the transfers would not exceed the revenue therefrom. This is in reality the "out-of-pocket cost" theory which was disapproved by this Court in *Northern Pacific Railway Co. v. North Dakota (supra)*, to which we have already referred.

But even though the "out-of-pocket cost" theory were applied to this case, the undisputed facts show that if the Belt Line Company were required to comply with the joint rate order of October 29th, 1912, the increase in its operating expenses would be in excess of the income to be received.

The counsel for the Transit Commission have seized upon the fact that because the cutting off of the joint rate by the interlocutory injunction herein (thereby cutting off eight to ten thousand passengers per day) relieved the Belt Line Company from the necessity of increasing its cars and car mileage as it was being summarily ordered to do by the Public Service Commission, the Belt Line Company did not decrease its car mileage after the injunction and from this fact argue that the cutting off of the joint rate did not decrease the Company's expenses. Thus counsel state on page 34 of their brief, that the elimination of transfers did not bring about "any appreciable decrease in car mileage", and then state:

"If taking away the transfers did not decrease the car mileage, there is no basis for any inference that their restoration would increase it."

We have already shown from the testimony of Mr.

William O. Smith, the Supervising Transit Inspector of the appellant Transit Commission and by the letters of the Public Service Commission that there is no possible foundation in this case for the statement above quoted but, on the contrary, the proof squarely and conclusively shows that were it not for the interlocutory injunction herein the Belt Line Company would have had to increase its car mileage which would have meant a corresponding increase in operating expenses.

In this connection, we wish to emphasize the fact which is well known to the counsel for the Transit Commission, that at no time has the Belt Line Company claimed that the decrease of expenses actually incurred after the injunction was due to the cutting off of the transfers under the interlocutory injunction herein.

For this reason it is an idle waste of time for the counsel for the Transit Commission to devote many pages of their brief to a refutation of an argument which neither we nor the Court below have relied upon.

What the Belt Line Company claims and what has been established by the uncontradicted proof herein, is that if the injunction order had not been obtained the Company would have been compelled to greatly increase its car mileage and thereby proportionately increase its operating expenses.

It was indisputably proven in this case that the increase in mileage and operating expenses which will be necessary if the Belt Line Company were required to resume the carrying of joint rate passengers, would result in an increase in operating expenses far in excess of the revenue to be derived from the joint rate passengers.

As we have shown (*supra*, pp. 23, 24) the Belt Line Company did not earn enough in the period after the

injunction (cutting off the joint rate) to pay a return on its property investment of \$2,600,000. The deficit was over \$59,000. If the Belt Line Company lost \$59,000 even without the joint rate passengers, it follows that this loss would be greater if it were required to carry the two-cent passengers because, as we have stated, it is undisputed in this case that as the number of passengers is increased, the car mileage and expenses would increase in the same proportion.

The Learned District Judge stated that the computation of the increase in probable revenue for the year ended June 30, 1922 of \$42,000 took no account of the loss of revenue which the Belt Line Company would sustain by reason of the fact that many of the passengers from whom it was receiving five cents since the injunction, would be two-cent passengers if the joint rate were in effect.

As a matter of fact, the figure of \$42,000 as a possible increase in revenue for the year ended June 30, 1922, is too high. The Learned District Judge assumed that for the year ended June 30, 1922 there would be a 12½% increase in the number of passengers carried, and a computation of additional revenue of two cents per passenger on that basis, without making any allowance for a possible loss of revenue by reason of the five-cent passengers who would become two-cent passengers, would show an increase in revenue of \$35,597.74—12½% of 14,239,099 (the number of passengers carried during the year ended June 30th, 1922) (Exhibit BF, R. p. 332) equals 1,779,887, and 1,779,998 passengers at two cents each equals \$35,597.74.

It is to be noted also that the Learned District Judge figured only a 10% increase in expense, whereas, as we have shown, the increase in expense would be the same as the increase in the number of passengers carried for

the year ended June 30, 1922. Even on the basis suggested by the District Judge, the additional revenue would have been \$35,597.74, but this amount would be practically entirely wiped out by the loss of five-cent passengers who would become two-cent passengers under the joint rate. Thus, there would be nothing to offset the additional expense of \$46,000.

Just how much worse off the Company would have been during the period after the injunction if it had been required to carry the joint rate passengers, is shown by Exhibit BP (R. p. 256), from which it appears that the balance of \$48,583.29 available for depreciation and a full return on the property investment (which, after deducting the amounts necessary for a full return on the property investment leaves a deficit of \$59,492.46, without making any allowance for depreciation) would have turned into a deficit of \$217,755.55, or, as heretofore shown (*supra*, pp. 33, 34) a deficit of \$138,917.05 if the increase in expense were only half of the increase in the passengers.

The actual number of five cent and two cent passengers and free transfer passengers carried in the post-injunction period (February 1, 1921 to September 30, 1922) was 23,631,081 (Exhibit BP, R. Insert, p. 356), and from these passengers the Company received in fares \$866,434.35.

The above Exhibit also shows that if in that period the injunction herein had not been in effect and the Company had carried the same number of five cent and two cent passengers that it carried in the corresponding pre-injunction period, it would have carried 28,685,771 passengers and would have received in fares during the post-injunction period the sum of \$860,103.46.

The above shows that from the 23,631,081 passengers actually carried in the post-injunction period, the Belt

Line Company received more in fares than it would have received if the injunction had not been in force and it had carried 28,685,771 passengers, including the joint rate passengers now cut off by the injunction. The reason for this is that the receipts from the additional two cent passengers who would have been carried had the injunction not been in force, would not have equalled **the loss which the Company would have sustained from the fact that many passengers now paying five cent fares would, if the joint rate were resumed, become joint rate passengers from whom the Company would only receive two cents.**

It is obvious, therefore, that instead of the resumption of the joint rate resulting in added revenue to the Company, as assumed by the appellants herein, it would, in effect, as above shown, result in less revenue to the Company.

And not only would there be no added revenue from the resumption of the joint rate passengers, but there would be additional operating expenses due to the necessity of furnishing more cars and more car mileage to take care of the additional joint rate passengers.

Exhibit BP shows that the actual operating expenses, not including any allowance for depreciation, during the period February 1, 1921 to September 30, 1922, was \$750,842.84, and that if the same number of passengers had been carried during that period as were carried in the pre-injunction period—February 1, 1919 to September 30, 1920—the operating expenses, exclusive of depreciation, would have been \$908,519.83, or an increase in operating expenses for that period of \$157,676.99.

To summarize, the resumption of the carrying of joint rate passengers during the 20 months February 1, 1921 to September 30, 1922, would, as shown on Exhibit BP, have

decreased the revenue by \$6,330.89, and increased the operating expenses, exclusive of depreciation, by \$157,676.99, making the loss from the joint rate passengers if they had been carried in that period \$164,007.88, and such loss does not include any interest on mortgage or note indebtedness or return on the Belt Line Company's property.

Thus it is clear that the joint rate order of October 29th, 1912 is confiscatory, not only by the finding of the Public Service Commission itself to that effect, but also upon any of the theories which have been applied in this case.

#### POINT IV.

**The Belt Line Company is entitled to complain of the joint rate order of October 29, 1912, as an infringement of its constitutional right.**

This point is in answer to Point VI in the brief of the appellant, Transit Commission, wherein it is argued that because the plaintiff came into existence after the order of October 29th, 1912, it is not entitled to complain of such order as an infringement of any constitutional right, and in making such point, the appellants rely upon the decision of this Court in *Interstate Railway Co. v. Massachusetts*, 207 U. S. 79. This is the point upon which the appellant, Transit Commission, relied in its motion to dismiss the complaint, which motion was denied by Judge Hough (see Opinion, R. p. 75).

The decision of this Court in *Interstate Railway Co. v. Massachusetts* has no application to this case.

Concededly, the Belt Line Company came into existence as the reorganization of the Central Park Company under §9 of the Stock Corporation Law. The Certificate of In-

corporation of the Belt Line Company (R. p. 286) conclusively shows this, and, in fact, this is unquestioned.

It follows, therefore, that the Belt Line Railway Corporation *stands in the shoes of the Central Park Company*, because former §9 of the Stock Corporation Law (Appendix B) under which the Belt Line Company came into existence, specifically states:

*"Such corporation shall be vested with and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in, the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation."*

The Central Park Company, which was "the corporation last owning the property sold," certainly had the right to attack the order of October 29, 1912, as unconstitutional at any time when that order became confiscatory, and that right was one of the rights which "vested" in the new corporation and which the new corporation is "entitled to exercise and enjoy."

It follows, therefore, that there must be read into, and as a part of, the charter of the Belt Line Company, the "right" which the Central Park Company had to attack the order of October 29th, 1912, on the ground of its unconstitutionality whenever it should become confiscatory.

The appellants, in advancing their argument, rely upon that part of §9 which we have not italicized above, to wit,

*"and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation."*

The fallacy of such an argument is obvious.

The same section of the law which contains the provision upon which the appellants rely also expressly provides that the reorganized corporation shall have all the "rights, privileges and franchises" of the former corporation. In other words, the Belt Line Company, not being a party to the order of October 29th, 1912, in taking under §9 the obligation of the Central Park Company, also took with that obligation all the rights which the Central Park Company had with respect to that obligation including the right to contest the order when it became confiscatory.

Furthermore, the argument of the appellants that the Belt Line Company has no right to contest the unconstitutional order does violence to the constitutional rights of the purchaser at the mortgage foreclosure sale under which the property of the Central Park Company was sold.

The franchises of the Central Park Company to operate a railroad—coming as it did direct from the Legislature (Chapter 511 of the Laws of 1860)—was property, which, as held in *People v. O'Brien*, 111 N. Y., 1, cannot be impaired or confiscated. The Belt Line Company acquired this railroad and franchises from the purchaser at the foreclosure sale under the mortgage made by the Central Park Company on December 1, 1872 (R. p. 271) *40 years prior to the order of October 29th, 1912*. The State of New York authorized the Central Park Company to mortgage its road and franchises. The right to mortgage gives to the mortgagees the right to sell on foreclosure, and if the purchaser on foreclosure cannot acquire that which was mortgaged, then, of course, the sale would be a farce.

In *People ex rel. Westchester Street R. R. Co. v. Public Service Commission*, 158 App. Div., 251, at 253, it was held:

"The laws of the State contemplate that a railroad shall be operated by a railroad company."

citing

*Trojan Ry. Co. v. City of Troy*, 125 App. Div., 362; *Village of Phoenix v. Gannon*, 195 N. Y., 471; *New York Terminal Co. v. Gaus*, 139 App. Div., 347, 348.

In addition to the above judicial decisions, the State of New York in enacting §9 of the Stock Corporation Law provided that the purchaser on such foreclosure sale can become a corporation for the purpose of exercising all the franchises and using the property purchased on the foreclosure sale.

Since, therefore, the purchaser on the foreclosure sale had the right to exercise the same franchises and the same rights which the Central Park Company had, and since the corporation stands in the shoes of the purchaser and, in fact, is the purchaser on such foreclosure sale, it follows that the Belt Line Company did not surrender, or accept in an impaired condition, the franchises, rights and property which were acquired under the mortgage.

This conclusion also follows from the decision of the New York Court of Appeals in *People ex rel. Third Avenue Railway Co. v. Public Service Commission*, 203 N. Y. 299. In that case, the Third Avenue Railway Company was incorporated under §9 as a reorganization of the Third Avenue Railroad Company. At the time of the incorporation of the new Company, §§53, 54 and 55 of the Public Service Commissions Law were in effect, and provided (§§53 and 54) that franchises and privileges could not be sold without the permission of the Public

Service Commission, and that securities could not be issued without the authority of such Commission. Nevertheless, the Court of Appeals held (p. 308, Cullen, Ch. J.):

"These provisions have no application to the regulator company. The franchise of the Third Avenue Railroad Company was property and could not be destroyed. (*People v. O'Brien*, 111 N. Y. 1.) The statute empowered that company to mortgage its property and franchises and under that authority they were mortgaged and sold to the individual relators who became the purchasers thereof. The right of the bondholders under the mortgage to have the mortgaged property sold in satisfaction of their claims and the right of the purchasers to the franchises and property bought by them were inviolable."

In other words, if the Belt Line Company is now required to operate its franchises at a loss because it cannot attack the order of October 29th, 1912, then the property which was mortgaged to the bondholders under the mortgage of the Central Park Company—made 40 years prior to the order of October 29, 1912—has been confiscated and its rights impaired.

In *Minor v. Erie Railroad Co.*, 171 N. Y. 566, the Court of Appeals of the State of New York held that the Erie Railroad Company, incorporated under §9 of the Stock Corporation Law before its amendment by Chapter 706 of the Laws of 1904, could not attack the constitutionality of the Mileage Book Act because §9 at that time read that when such corporation came into existence it was subject to all the provisions, duties and liabilities imposed by law "*on such corporations.*" In so holding, Chief Judge Parker, writing for the majority of the Court, said:

"If the Legislature had intended that the new corporation should be subject only to the same duties and liabilities as were imposed on the old corporation, the section would have read 'and shall be subject to all the provisions, duties and liabilities imposed by law on such *corporation*.' The Legislature, however, did not employ that language but said that it should be subject to the duties, etc., imposed by law upon 'such *corporations*' thereby indicating a purpose to subject it to all the general provisions of law governing railroad corporations. It cannot be urged that such use of the plural in the last line was inadvertent, for the section is very carefully drawn \* \* \*."

After this opinion had been rendered in *Minor v. Erie Railroad Co.* (*supra*), and after reargument had been denied, the Legislature amended the law by providing exactly what Chief Judge Parker had suggested, except for the use of the words "that corporation" instead of "such corporations," thus making it much clearer.

If, therefore, in the case of *Minor v. Erie Railroad Co.*, the Erie Railroad Company could have attacked the unconstitutionality of the Mileage Book Act if the Stock Corporation Law read at that time the same as it did when the Belt Line Company came into existence, it follows that the Belt Line Company has the right to attack the unconstitutionality of the joint rate order of October 29th, 1912. In other words, it is clear that the Legislature intended by the amendment of §9 that the new corporation should stand in the shoes of the old one and should be vested with all the rights of the old corporation, unimpaired in any way whatever.

Moreover, as stated by Judge Hough (R. p. 76), a general statute is a very different thing from a regulatory order of the Commission.

Naturally, the general laws of a State are fairly well-known, but to require incorporators of proposed corporations and investors in the stock to examine every order of each of the regulatory commissions before incorporating or investing in stock, would be intolerable.

We repeat, however, that if anything in connection with the order of October 29th, 1912, is to be read into and as a part of the charter of the Belt Line Company, there must be included therewith the provision whereby the Belt Line Company had all the rights, franchises and privileges of the Central Park Company, including the right to attack the order of October 29th, 1912, on the ground of its unconstitutionality whenever it should become confiscatory.

It follows, therefore, that because the Belt Line Company stands in the shoes of the Central Park Company and has all the rights which the Central Park Company had, and also because the purchaser on the mortgage foreclosure sale bought the property and franchises of the Central Park Company unimpaired by any confiscatory orders, and for the further reason that regulatory orders of the Commission could never be placed in the same class as general statutes, the Belt Line Company has the right to complain that the joint rate order of October 29th, 1912, is confiscatory.

**POINT V.**

**There has been no action or conduct on the part of the Belt Line Company which gives any foundation whatever for the appellants' claim that the Company is not entitled to equitable relief.**

This Point is in answer to Point V in the brief of the appellant, Transit Commission, wherein that appellant seeks to argue that the Belt Line Company's conduct has been such as to disentitle it to equitable relief.

Notwithstanding the fact that there is no evidence on which the appellants can base such an argument, nevertheless even though there were evidence, this was a matter upon which the District Court exercised its discretion and the exercise of such discretion will not be disturbed by this Court.

For the reason, however, that the advancing of such an argument injects into the case the question of good faith, we propose to answer it.

We have already shown that the claim that there was collusive maneuvering between Messrs. Winthrop & Stimson and the attorney for the Belt Line Company is not only without any possible foundation, but is contrary to the Transit Commission's own answer in this case, and we have called attention to the fact that this insinuation was put into the case at the very last moment when the District Judge had before him the question of confirming the Master's report and granting the final injunction, at which time there was no opportunity for testimony under oath.

The suggestion that the Belt Line Company might have a reapportionment of the joint rate is absurd on its face, in view of the undisputed fact that the average length of

haul of the north and south lines is far in excess of the length of haul on the Belt Line Company's 59th Street Crosstown Line.

The statement that the Belt Line Company rejected the seven-cent joint rate, aside from being immaterial, is incorrect. All that the Belt Line Company did was to ask for a rehearing almost two months before the seven-cent rate was to take effect, and that certainly is not a rejection of it. The application of the Belt Line Company was never acted upon by the Public Service Commission until November 4th, 1920, almost four months after the application was made. In the meantime, however, on the application of the Receiver for the New York Railways Company, made August 28th, 1920, the Public Service Commission on August 31st, 1920, suspended the seven-cent joint rate. Therefore, aside from anything which the Belt Line Company did, the Public Service Commission suspended the joint rate and have never taken any action to make any other joint rate.

Any argument concerning the seven-cent rate is entirely immaterial because the only issue in this case and the only issue which there ever can be before any Court, is whether the five-cent joint rate order of October 29th, 1912, is confiscatory.

The Public Service Commission and the Transit Commission have always been entirely free to fix a joint rate order which is not confiscatory. The important point is that since the Federal Courts cannot make rates, the only issue which could possibly be before the Courts in this case is whether the five-cent rate is confiscatory, that being the only rate in force and the only joint rate which has ever been in force.

On pages 13 and 35, as well as under Point V of its

brief, the appellant, Transit Commission, claims that because other companies of the Third Avenue Railway System have obtained more passengers because of the cutting off of the transfers by the injunction herein, that such facts constitute inequitable conduct on the part of the Belt Line Company.

If the injunction in this case actually prevents confiscation of the plaintiff's property and prevents it from being compelled to carry passengers at a loss, it is entirely immaterial how that injunction affects any other railway company which is not complaining thereof.

But aside from the fact that the claim made by the appellant, Transit Commission, is entirely unfounded as well as immaterial, we are unable to understand by what motives such a contention is actuated or made by a regulatory commission. Bearing in mind that the outstanding fact upon which the appellant, Transit Commission, makes this contention is that a number of passengers who formerly, under the joint rate order, rode on lines of the Second Avenue Railroad Company and lines of the New York Railways Company, are now able to ride on the lines of the Third Avenue Company and the 42nd Street Company *without paying an extra fare of five cents*, the attempted criticism of the appellant, Transit Commission, is not only astounding but is beyond comprehension. We had understood that the Transit Commission and the defendant, District Attorney, assumed to act on behalf of the People of the State of New York, but the brief of the appellant, Transit Commission, discloses that the Transit Commission is complaining because a greater number of transfer passengers can still ride for a single five-cent fare by using the Third Avenue Company lines and the 42nd Street Company line on Broadway, and thus save

themselves from any financial loss, by reason of the injunction which has been granted in this case.

If the counsel for the Transit Commission were actuated by a desire to benefit the public, it is inconceivable that any complaint can be based upon the fact that the Belt Line Company when it asked for the injunction herein, excepted from the operation of such injunction the lines of the Third Avenue Company and the 42nd Street Company on Broadway, thus enabling many of the passengers to still have the same facilities which they previously had. It is certainly no reason for criticism or even unfavorable comment by the Transit Commission that the Belt Line Company sought to minimize the effect of the injunction asked for in this case.

If the Belt Line Company has been able, by eliminating the joint rate between itself and the Second Avenue Railroad Company and the New York Railways Company, to still retain the others which were included in the joint rate order of October 29th, 1912, that fact should be an argument in favor of the injunction herein and in no wise an argument against it.

#### **POINT VI.**

**The District Court did not find, as claimed by Appellant Banton in his brief, that there was only a loss of \$4,000 per annum on the joint rate traffic cut off by the injunction herein.**

In the brief of Appellant Banton, the Corporation Counsel states (p. 2):

"After a series of adjustments, all relating to expenses and revenues connected with the transfer

traffic, many of them speculative and conjectural, the Court below found that there was only a loss of \$4,000 per annum on said traffic (R. p. 119)."

and then argues in his Point I that such a loss is so negligible compared to the total traffic involved as not to justify a decree of confiscation, and argues in his Point II that accepting the finding of such a loss of \$4,000 from the joint rate traffic, the Belt Line Company earned a fair return on the valuation found by the Master.

Both of said Points are based on a false premise, because the claimed finding of a \$4,000 loss is deduced from the District Court's figures of \$42,000, whereas Judge Knox, in his opinion, stated that his assumed additional revenue of \$42,000 from resumption of joint rate passengers was (R. p. 119),

"without reference to a possible loss of revenue to plaintiff arising from the fact that numerous passengers who now pay five cents for a ride on the 59th Street Crosstown Line, would, if transfers are restored, pay into the treasury of complainant but two cents per ride, \* \* \*."

During the year ending June 30th, 1921, the Belt Line Company carried on its 59th Street line 7,600,575 five-cent passengers, whereas during the year ending June 30th, 1922, when the joint rate passengers cut off by the injunction were not carried, the Belt Line Company carried 8,100,009 five-cent passengers. In other words, after the injunction, the Belt Line Company carried in a year 499,434 more five-cent passengers than it carried in a year when the joint rate complained of herein was in effect.

The Master in referring to this large increase in five-cent passengers after the injunction stated (R. p. 93):

"\* \* \* There can be little doubt that the bulk of these passengers came from the 2 cent group of the earlier period. They had their accustomed N. or S. route with cross-over on 59th Street, and were satisfied to pay the additional five cents rather than take the trouble to find some new route. It is difficult to see where else they could have come from. There is no suggestion of any regional conditions tending to increase travel on 59th Street line, a ride beginning and ending on that line. General increase of population will not account for it \* \* \*."

If, therefore, the joint rate was again put in force, the 499,434 five-cent passengers above referred to would become two-cent passengers, representing a lessening in revenue to the Belt Line Company of three cents from each of said passengers, or a lessening in revenue for the year 1922 of \$14,983.02.

It follows, therefore, that if any consideration is to be given to the \$4,000 loss deduced from the opinion of the District Court, which figure was expressly stated to be without reference to the loss of revenue from the conversion of five-cent fares to two-cent fares, then there must be added to said sum of \$4,000 the sum of \$14,983.02, making, even on the District Court's increase in operating expenses of only 10% to take care of the added joint rate passengers, a loss of \$18,983.02, instead of a loss of only \$4,000.

Furthermore, in arriving at the above figure of \$18,983.02, there was included in operating expenses **no allowance for depreciation.**

Furthermore, the loss of \$4,000 referred to by the Appellant Banton, which he computed by deducting from the District Court's added operating expenses of \$46,000 the District Court's added revenue of \$42,000 (without considering loss from the conversion of five cent fares to two cent fares) is based upon the District Court's assumed increase in passenger expenses, if joint rate passengers were again carried, of only 10%, whereas the uncontradicted proof herein shows that if the joint rate passengers were again carried it would necessitate an increase in operating expenses of 21½%.

The arguments, therefore, of the Appellant Banton in his Point I and Point II are based on a false premise, in that they refer only to a loss of \$4,000 instead of a loss of \$18,983.02, plus an additional loss which would result if depreciation had been included, and plus a large additional loss which would result if the District Court had used in its calculation an increase in the operating expenses equal to the increase in passengers, namely, an increase of 21½% instead of only 10%.

#### **POINT VII.**

**The Appellant Banton's argument in his Point II that the Belt Line Company would, if it resumed the joint rate traffic, earn a fair return on the property is contrary to the evidence herein.**

The Appellant Banton states in his Point II that the Belt Line Company would, if it had resumed the joint rate traffic, have had a net return for the year ending June 30th, 1922, of \$161,200, and that that would represent a 6.2% return on the Master's valuation of the property.

The figure of \$161,200 referred to in said Point as a net return was arrived at by taking the figure of \$165,199.90 stated by the Master (R. p. 108), as the revenue in excess of operating expenses for said year and deducting therefrom the "loss of \$4,000," which as we have just pointed out, was erroneously assumed by the Appellant Banton to represent the District Court's finding of the loss which would result from the resumption of the joint rate traffic (R. p. 119).

There is no foundation under the evidence for the Appellant Banton's argument that the Company would have had a return of \$161,200 for the year ending June 30th, 1922, if it had resumed the carrying of the joint rate passengers. The Master's figure of \$165,199.90 was arrived at by taking as the revenue of that year, including interest on deposits made by the Company, the sum of \$580,526.88, and deducting therefrom operating expenses of \$415,-327.07, which produced the figure of \$165,199.90. It will be noted that these figures are taken from Exhibit BF (R. p. 332) and that the operating expenses shown thereon *do not include any allowance for depreciation.*

Exhibit BH, which sets forth the income from July 1st, 1920 to September 30th, 1922, as per the books and reports to the Public Service Commission and to the Transit Commission, shows that for the year ending June 30th, 1922, there was a depreciation charge for that year of \$47,192.55, so that if to the Master's figure of \$415,327.07 for operating expenses is added the above charge for depreciation for that year of \$47,192.55, the amount of revenue in excess of operating expenses and depreciation for that year would have been only \$118,007.35. If from the last mentioned figure there is deducted, for purposes of argument only, not the loss of \$4,000 used by the Appellant

Banton, but a loss of \$18,983.02 from the carrying of joint rate passengers during that year computed on the basis of only a 10% increase in operating expenses, but without any allowance for depreciation, as hereinbefore referred to, the net return of the Company on that basis would have been \$99,024.33 instead of \$161,200 as argued by the Appellant Banton in his Point II, or a return of 2.15% on the valuation found by the Master, to-wit, \$2,600,000. Or, to put it another way, said \$99,024.33 would represent a 6% return upon only \$1,650,405, or a return on a valuation \$1,000,000 less than the valuation of \$2,600,000 found by the Master.

As matter of fact if, in the above calculation there had been used an increase in operating expenses of 21% instead of 10% as used by the District Court which would have been necessary as shown by the undisputed evidence herein to cover the increase in cars and car mileage which would follow a resumption of the joint rate passengers, the above sum of \$99,024.33 would be greatly reduced.

Taking the figure shown on Exhibit BP, showing the results of operation for the period February 1, 1921 to September 30, 1922, with the revenue adjusted so as to represent the carrying in that period of the same number of five cent and two cent passengers as were carried in the corresponding pre-injunction period, and with the operating expenses adjusted by increasing the actual operating expenses by 21½% to take care of the necessary increase in cars and car mileage that would have been necessary, as established by the undisputed testimony herein, it appears that for that period the adjusted revenue was \$950,764.28 and that the adjusted operating expenses, without including any allowance for depreciation, were \$908,519.83, leaving as the amount available for de-

preciation and return for said twenty month period the sum of \$42,244.45.

We have hereinbefore shown that the depreciation charge on the books of the Company for one year, to-wit, the year ending June 30th, 1922, was \$47,192.55, so that on the basis of an increase in operating expenses of 21½% and an allowance for depreciation for only one year, the said operating expenses for the 20 months subsequent to the injunction, including depreciation for only one year, would have *exceeded the revenue for said period, leaving no return whatsoever upon the Company's property.*

#### **POINT VIII.**

**The valuation of the Belt Line Company's property found by the Master and approved by the District Court was justified by the evidence.**

This point is in answer to Point III of Appellant Banton's brief.

Inasmuch as we have shown that if the Belt Line Company is compelled to resume the carrying of the joint rate passengers its operating expenses will exceed its revenues and thus afford no return on its property, it will be unnecessary to enter into any extended discussion of the question of valuation.

It cannot be disputed in this case, as we have shown, that in both the pre-injunction period and the post injunction period, the actual cost of carrying each passenger, not including any charge for interest on indebtedness and not including any return on the Company's property, is far in excess of the two cents which the Belt Line Company would receive under the joint rate order of October

29, 1912. On this basis, the rate is confiscatory, irrespective of any valuation whatever. In other words, on this basis the Belt Line Company's property is consumed.

Notwithstanding that we might well rest the case on this basis that the actual cost of carrying passengers, not including any interest charge or return on capital, was in excess of the two cents which the Company would receive under the joint rate, nevertheless we again call attention to the fact that in the exhibits showing the results of operation in the various periods, and showing the cost per passenger including interest charges, a full return on the value of the Company's property was not deducted. In place of such full return there was deducted only 5% interest on \$1,823,091.53 (the amount of the First Mortgage and Notes), which is equivalent to a return of 6% on \$1,517,576. Inasmuch as these exhibits show, without the deduction of any interest charge or return and also without the deduction of a full return on its property, that the five cent joint rate is confiscatory, it is really unimportant to determine to a nicety just what the value of the Belt Line Company's property is.

In other words, in the financial statements received in evidence there was only deducted 5% interest on \$1,823,091.53 (being the amount of the First Mortgage and Notes), which interest deduction is equivalent to a 6% return on \$1,517,576, so that even on a valuation of \$1,000,000 less than the \$2,600,000 found by the Master and approved by the District Court, the proof clearly shows that the joint rate order complained of is confiscatory.

In order to avoid any possible criticism, however, of the interest charge set forth on the Belt Line Company's exhibits, evidence of the valuation of the company's property was introduced before the Master, which evidence we

have hereinbefore referred to and set forth in the facts under the heading of Valuation of Property of Belt Line Company.

The Appellant Banton, in his Point III, criticizes the valuation found by the Master and accepted by the District Court upon the ground that it was based solely on the cost to reproduce, less depreciation, giving no weight or consideration to the original cost or any other element of value.

It appears from the evidence before the Master that the witness John H. Madden, called as a witness by the Appellee, and who was, at the time he testified, in the employ of the Appellant Transit Commission, and who was charged with the duty of valuing street railroad properties for the Transit Commission, had compiled three different sets of figures of the Belt Line Company's property, viz.:

- (1) Reproduction cost as of June 30th, 1921;
- (2) Reproduction cost as of 1910-1914;
- (3) Original cost.

Mr. Madden was only asked by the Appellee to testify concerning the reproduction cost as of June 30th, 1921 less depreciation and concerning reproduction cost as of the time he was testifying less depreciation.

When the Master on the hearing referred to the other figures compiled by Mr. Madden, to-wit, the reproduction cost as of 1910-1914, and the original cost, counsel for the Appellee, Belt Line Company, stated that in his opinion the said figures were not relevant or competent, and the Master stated (R. p. 158) :

"All right; I believe you are right to bring out as many as you wish, and if the other side want more, they can bring them out."

Notwithstanding the fact that the witness Madden was an employee of the Appellant Transit Commission, and notwithstanding the fact that the figures in question were at all times available to the Appellant Transit Commission and the Appellant Banton (such figures being contained in the volume Exhibit BS, R. p. 259), neither the counsel for the Transit Commission nor the counsel for the District Attorney Banton saw fit to introduce such figures in evidence, and now we find the Appellant Banton criticizing the finding of the Master because he did not take into consideration the figures which neither the Appellant Banton nor the Appellant Transit Commission saw fit to introduce in evidence before the Master.

Moreover, counsel for the Appellant Banton in so strenuously urging that the figures of "original cost" should have been offered in evidence and considered by the Master, has overlooked the fact that the original cost of this property, sold at public auction, to Edward Cornell was \$1,673,000 (Ex. B, R. pp. 264-269), and that the original cost of this property to the Belt Line Company was, as sanctioned and authorized by the Public Service Commission, \$2,557,091.53 (Exs. M, N, O and P, being Exs. B, C, D and E annexed to the complaint, R. pp. 26-39).

The above figure is the Belt Line Company's investment in its street railroad property, and the only theory upon which original cost has ever been advanced as a basis of valuation for rate making purposes is that the public utility should be permitted to earn only on its investment.

If original cost were to be discussed as the basis of valuation, it makes no difference that the Belt Line Company has, in order to continue to operate the remainder of its street railroad, abandoned parts of its line because its investment still remains, and it has not earned enough to amortize or write off the capital loss caused by the abandonment.

Inasmuch as the above figures of original cost were before the Master, the Appellant Banton cannot justly argue that the Master gave no weight or consideration to such figures, simply because he found a valuation from the testimony of the witness Madden based upon his estimate of the cost to reproduce new as of 1921 or as of the time the witness was testifying. For all that appears in the report of the Master, the original cost of the property to the Belt Line Company, as sanctioned and authorized by the Public Service Commission, may have been a consideration which led the Master to accept the valuation of \$2,600,000 herein.

In the recent case of *Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission*, 262 U. S., 276, this Court said (pp. 287-288) :

"It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible.

Estimates for tomorrow cannot ignore prices of today."

The decision of this Court in the above case was followed in *Bluefield W. W. & I. Company v. Public Service Commission*, 262 U. S., 679, in which case this Court reversed the Supreme Court of West Virginia, because the values that existed at the time of the regulation were disregarded.

The case of *Georgia Railway & Power Company v. Railroad Commission* (262 U. S., 625), cited by the Appellant Banton at page 17 of his brief, was distinguished from the *Southwestern Bell Telephone Company* case, as indicated by the statement of Mr. Justice Brandeis in his opinion therein (p. 629) :

"The case is unlike *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, ante, 276. \* \* \*"

But, as we have stated above, even if original cost were to be considered in this case \$2,557,091.53 is the cost of this property to the Belt Line Railway Corporation, as sanctioned and authorized by the Public Service Commission (\$1,673,000 thereof represents the cost of the property at public auction and the balance represents the improvements actually put in the property), and this is the only figure of original cost in the case. When this figure is considered in connection with Mr. Madden's figure of \$2,504,478.60, *not including any real estate*, the Master's finding of \$2,600,000 as the valuation is amply supported. In fact it is too low.

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The Appellant Banton argues in his Point IV that the

valuation found by the Master and adopted by the District Court included property not devoted to rendering service involved in the transfer traffic. The answer to such argument is that under the principle laid down by this Court in *Northern Pacific Railway Company v. North Dakota*, 236 U. S., 585, the joint rate traffic was properly chargeable with its proportion of the cost of the entire operation of the Company, and it is, therefore, necessary if the valuation of the property is to be considered at all, to include the entire property of the Belt Line Company.

The proof shows that all income from property not used directly by the Belt Line Company was included in the Belt Line Company's exhibits herein (Ex. J annexed to the Complaint, R. p. 46, being Ex. Y before the Master, R. p. 307; Exs. BE, BF and BG, R. pp. 330-334), and, as pointed out by the Master with respect to the real estate, such treatment of income was more to the advantage of the defendants, than if such property had been excluded from the valuation and the income therefrom excluded (R. p. 108).

With respect to the amount deducted by the Master for depreciation, if the Appellant Banton and the Appellant Transit Commission differed with Mr. Madden in his estimate of such depreciation, they were at liberty to introduce evidence thereon. The fact that they did not see fit to call any witnesses upon that subject is significant of the fact that Mr. Madden's estimate was entirely proper.

Moreover, the Master eliminated practically all the undisputed valuation of the Belt Line Company's land which was \$531,000 (see *supra*, p. 16). The exclusion of practically all of this valuation of the land is sufficient to more than make up the amount of depreciation computed on any other theory than that adopted by the Special Master.

**In Conclusion.**

The joint rate entitling passengers to ride on the lines of two independent railroad companies for a single five-cent fare, under which the Belt Line Company received only two cents from each of such joint rate passengers, was fixed in 1912.

That rate is the only rate before the Court in this case. No other joint rate has ever been in force since 1912.

The proof shows (*supra*, p. 17) and it is undisputed, that since the fixing of the joint rate in 1912 the prices of labor and material involved in operating the Belt Line Company's railroad have advanced from 75% to 100% over what they were in 1912.

In view of such advances in prices, it is obvious that the receipt of two cents per passenger under the joint rate order made in 1912 and proper at that time, could not possibly be adequate in 1920-1925 when costs are practically double what they were in 1912. In other words, a rate of two cents per passenger as of 1912 is equivalent to a rate of only one cent per passenger in 1920-1925.

The Commission recognized that a joint rate proper in 1912 was not proper in 1920, when it found in its order of July 9, 1920, that by reason of "changed conditions," the five-cent joint rate fixed by the order of October 29th, 1912, was "insufficient to render a fair and reasonable return for the service furnished."

The Commission has at all times been free to make another joint rate but it has never done so.

The proof shows that the actual cost to the Belt Line Company (not even including depreciation or any in-

terest charges) of carrying each of its passengers during all of the periods under review in this case was far in excess of the two cents it was receiving or, but for the interlocutory injunction and the final injunction herein, would have received, from the joint rate passengers.

The proof shows that if the Belt Line Company were required to comply with the joint rate order of October 29th, 1912, the additional operating expenses would, by reason of the increased car mileage made necessary by such resumption of the joint rate, exceed the income therefrom.

There is not the slightest ground for the assumption, which is the sole basis of the Transit Commission's argument, that the additional number of joint rate passengers (8,000 to 10,000 additional per day, or an increase of 20% to 25%) could be carried without increasing the cars and car mileage. On the contrary, it is undisputed that the resumption of the joint rate would increase the Belt Line Company's expenses in the same proportion as the increase in passengers.

The argument by the Transit Commission that the additional passengers could be carried by the Belt Line Company without any increase in cars or car mileage, is directly contrary to the testimony of its own Supervising Transit Inspector, William O. Smith, who testified that even in January, 1923, without the increase in passengers which would result from the resumption of the joint rate, the Belt Line Company should increase its cars and car mileage at least 10%.

The valuation of \$2,600,000, as found by the Master and as confirmed by the Court, was amply supported by the *only* evidence in the case.

**The decree appealed from should be affirmed.**

Dated March 4th, 1925.

Respectfully submitted,

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ADDISON B. SCOVILLE,  
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